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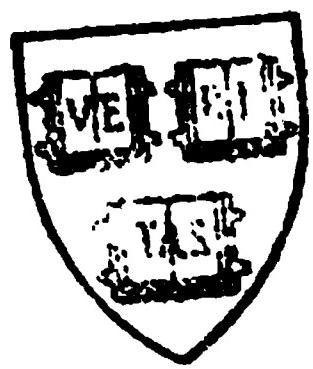
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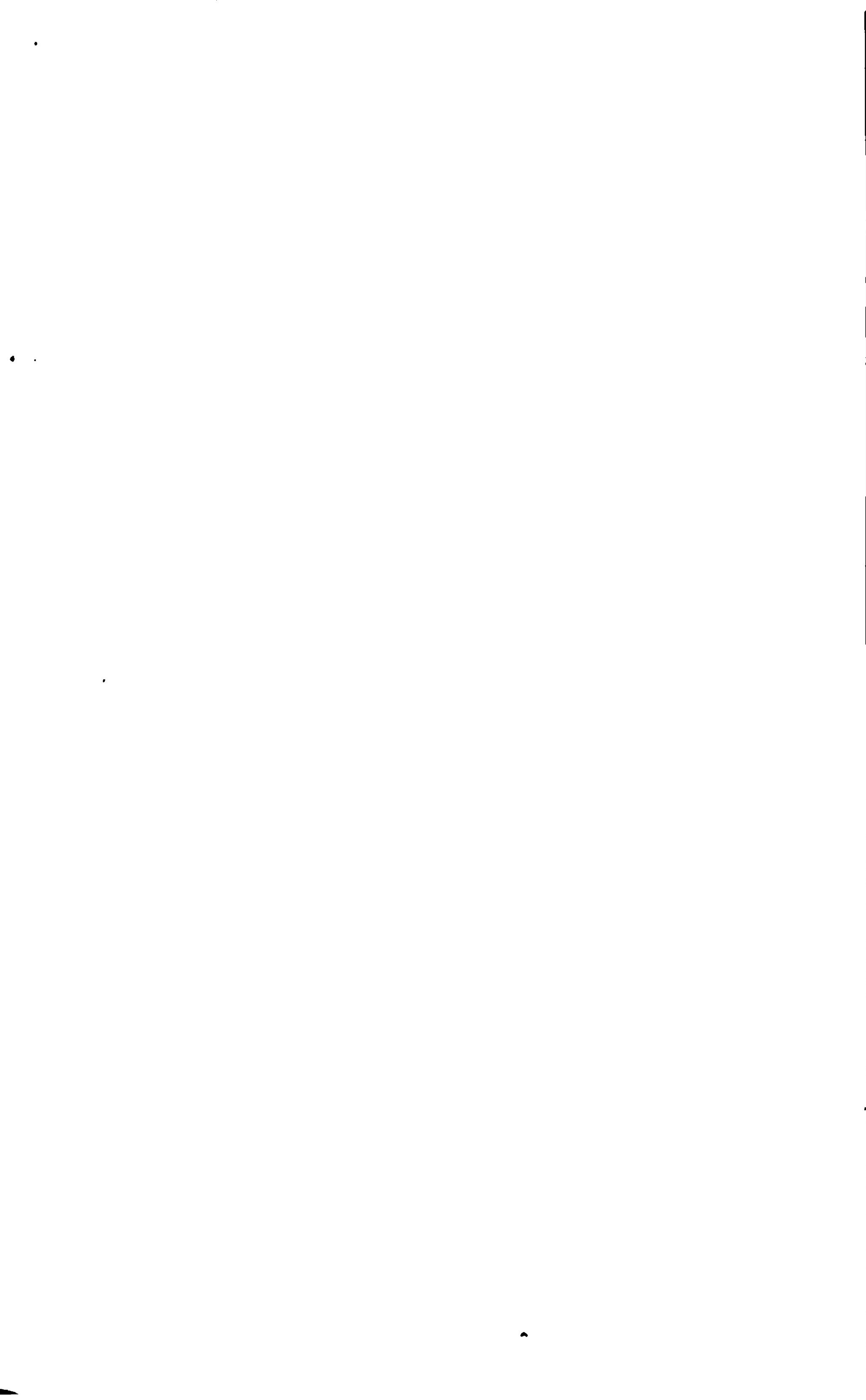
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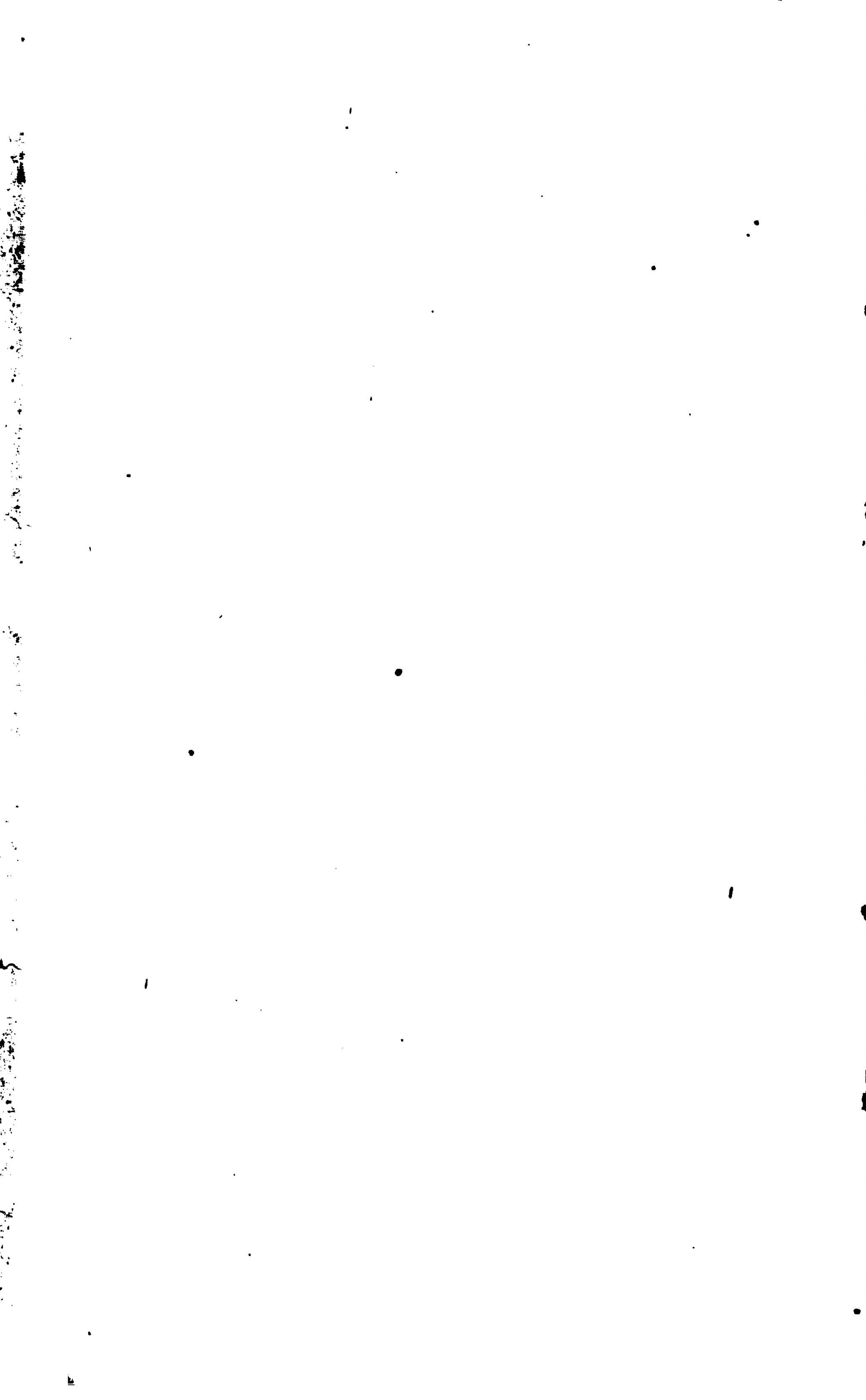


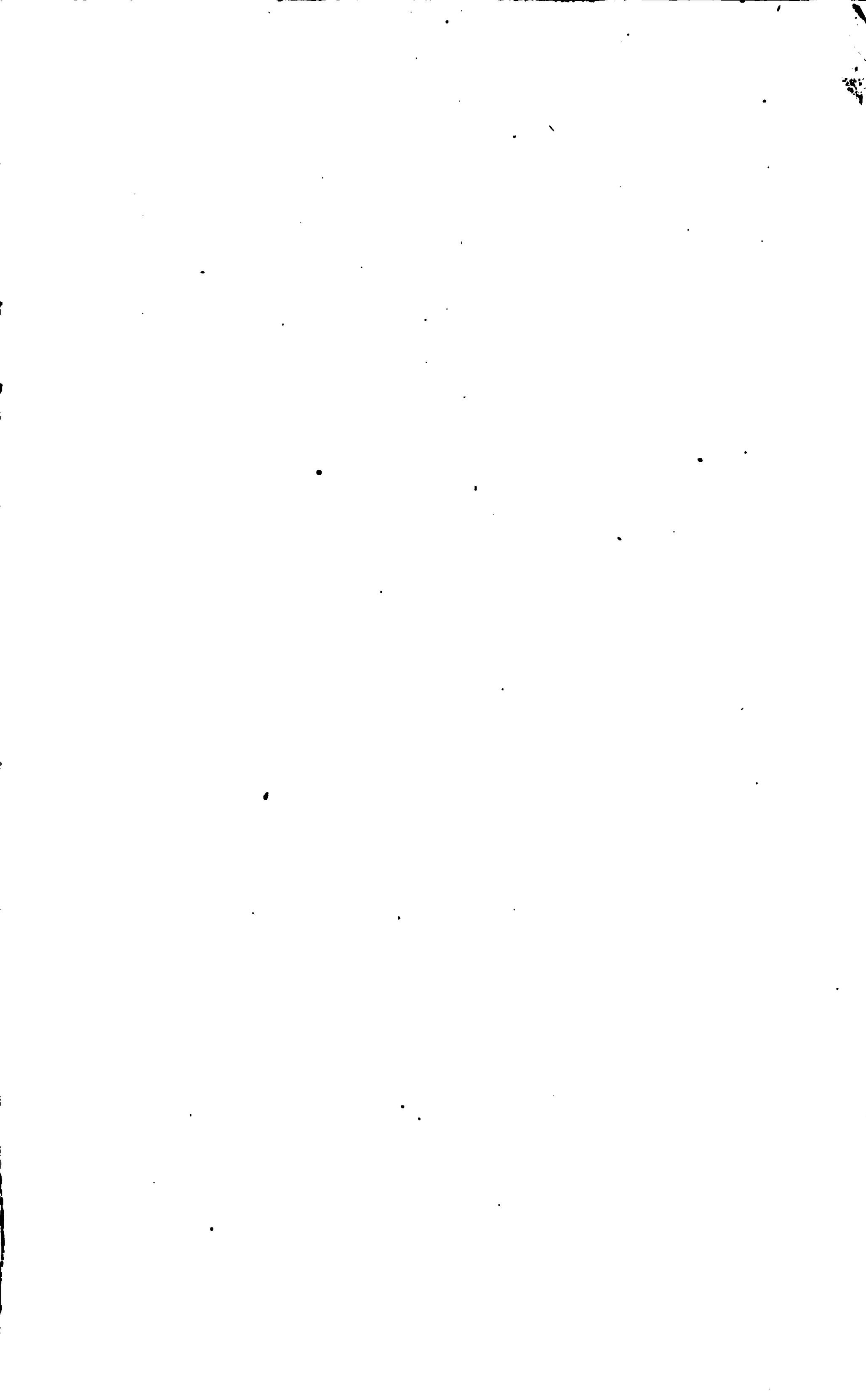
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REPORTS
OF
CASES ARGUED AND DETERMINED
IN THE

SUPREME COURT OF JUDICATURE

OF THE
STATE OF INDIANA,

WITH TABLES OF THE CASES REPORTED AND CASES
CITED AND AN INDEX.

By FRANCIS M. DICE,
OFFICIAL REPORTER.

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JUDGES
OF THE
SUPREME COURT
OF THE
STATE OF INDIANA,
DURING THE TIME OF THESE REPORTS.

HON. WILLIAM E. NIBLACK.* †

HON. GEORGE V. HOWK.†

HON. BYRON K. ELLIOTT.‡

HON. ALLEN ZOLLARS. †

HON. EDWIN P. HAMMOND.§

*Chief Justice at the May Term, 1883.

† Term of office commenced January 1st, 1883.

‡ Term of office commenced January 3d, 1881.

§ Appointed May 14th, 1883, to succeed Hon. WILLIAM A. WOODS.

SUPREME COURT COMMISSIONERS

OF THE

STATE OF INDIANA,

DURING THE TIME OF THESE REPORTS.

Hon. GEORGE A. BICKNELL.*†

Hon. JOHN MORRIS.†

Hon. WILLIAM M. FRANKLIN.†

Hon. JAMES I. BEST.†

Hon. JAMES R. BLACK.‡

..

*Chief Commissioner.

†Appointed April 27th, 1881.

‡Appointed May 29th, 1882.

**OFFICERS
OF THE
SUPREME COURT.**

**CLERK,
SIMON P. SHEERIN.**

**SHERIFF,
JAMES ELDER.**

**LIBRARIAN,
CHARLES E. COX.**

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF JUDICATURE
OF THE
STATE OF INDIANA,
AT INDIANAPOLIS, MAY TERM, 1883, IN THE SIXTY-SEVENTH
YEAR OF THE STATE.

No. 7058.

THE STANDARD OIL COMPANY v. BACHELOR, TREASURER.

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TAXATION.—*Personal Property of Non-Resident.*—*Situs.*—*In Transitu.*—Cases *Doubted.*—The personal property of a non-resident of this State, at a railroad station, and awaiting shipment to the residence of the owner, has no permanent *situs* here, and is not taxable in this State. *Powell v. City of Madison*, 21 Ind. 335, and *Rieman v. Shepard*, 27 Ind. 288, doubted.

From the Wells Circuit Court.

R. S. Taylor and S. L. Morris, for appellant.

J. S. Dailey and L. Mock, for appellee.

NIBLACK, C. J.—Suit by the Standard Oil Company, a corporation doing business in the city of Cleveland, in the State of Ohio, against Lemuel Bachelor, treasurer of Wells county, in this State, to enjoin the collection of certain taxes. The complaint charged that the plaintiff was engaged in the business of refining and selling coal and kerosene oils, and other products of crude coal oil; that, in aid of its business, and

The Standard Oil Company v. Bachelor, Treasurer.

for its own use, it manufactured, at said city of Cleveland, a great number of barrels from oak staves; that, for the manufacture of such barrels, the plaintiff was accustomed to purchase staves at various points in the States of Ohio, Virginia, Indiana and elsewhere, to be shipped by the most convenient railroads to its yard at Cleveland; that, prior to the first day of April, 1875, and in its ordinary course of business, the plaintiff purchased a lot of staves in the State of Indiana, for shipment and exportation to its place of business at the city of Cleveland, to be used in making barrels, and not for sale, use or enjoyment in this State; that these staves were piled up, as purchased, in the town of Bluffton, in the county of Wells, near the track of the Fort Wayne, Muncie and Cincinnati railroad, so as to be convenient for loading on the cars of that railroad, and were remaining at that place on said 1st day of April, 1875, merely awaiting an opportunity for shipment to Cleveland, as above stated, and for no other purpose whatever; that it was impossible to state how long the identical staves so awaiting shipment at the time named had been owned by the plaintiff, and piled up near the railroad track, as the plaintiff had been constantly purchasing and shipping staves at that point for a year or more previously; that shortly after the said 1st day of April, 1875, the assessor of Wells county listed the staves so piled up for taxation, and placed them on the assessment roll of the county, at the estimated value of \$4,900; that such staves were thereupon entered as taxable property upon the tax duplicate of said county for the year 1875, and the sum of \$80.36 charged against them as taxes due thereon; that said tax duplicate had been placed in the hands of the defendant, as treasurer of the county, who was threatening to collect the sum thus charged as taxes upon the staves, by levy upon, and sale of, the property of the plaintiff.

A demurrer for want of sufficient facts was sustained to the complaint, and, the plaintiff declining to plead further, final judgment was rendered in favor of the defendant. This appeal raises only the question of the sufficiency of the com-

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plaint. It is argued in support of the complaint that the proper inference from the facts charged is that the staves, when listed for taxation, were *in transitu* between the places at which they were purchased in this State and the city of Cleveland, in Ohio, and that hence they had no such *situs* within this State as was necessary to make them taxable property under the law then in force, when rightly construed by the courts.

The third section of the act of December 21st, 1872, concerning the assessment of property (1 R. S. 1876, p. 73), which was in force in 1875, enacted that "All real property within this State, and all personal property owned by persons residing in this State, whether it is in or out of this State, and all personal property within this State, owned by persons not residing within this State, subject to the exceptions hereinafter stated, shall be subject to taxation."

The facts upon which this case rests did not bring it within any of the exceptions referred to in the foregoing section. As regards the taxation of personal property, Burroughs on Taxation states the rule to be that "Where the owner resides in one State and the property consists of goods and chattels which have an actual *situs* in another State, it is well settled that the owner is not to be taxed at his residence or domicile for property situated in another State. Generally the owner of property is taxed at the place of his residence for all his personal property, but where the property has a visible and tangible existence, not at the domicile of the owner, and is permanently situated at another place, it is liable to taxation at the place of its situation."

After giving some illustrations of the application of this rule, and citing some authorities bearing upon it, that author proceeds to reiterate as follows: "The rule is clear and well settled as to chattels having an actual permanent *situs* in a State different from the owner, that they may be taxed at their *situs*, without reference to the residence of the owner." See pages 40 and 41. This rule is supported either directly or

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in general terms by the following cases: *Conley v. Chedic*, 7 Nevada, 336; *People v. Niles*, 35 Cal. 282; *State v. Haight*, 30 N. J. L. 428; *People v. Commissioners of Taxes*, 23 N. Y. 224; *Powell v. City of Madison*, 21 Ind. 335; *Rieman v. Shepard*, 27 Ind. 288; *Herron v. Keeran*, 59 Ind. 472 (26 Am. R. 87); *Mayor, etc., v. Baldwin*, 57 Ala. 61 (29 Am. R. 712); *Hunter v. Board of Supervisors*, 33 Iowa, 376 (9 Am. R. 132); *Ogilvie v. Crawford County*, 12 Reporter, 196.

Recognizing the rule as above stated by Burroughs, and as deducible from it, it must be held that personal property found in transit through, or temporarily within, a State other than the one in which the owner resides, can not be taxed in the State in which it is so found, on the principle that for the purposes of taxation it belongs to the State in which the owner has his residence.

As stated in the case of *Herron v. Keeran, supra*, the section of the statute herein above set out can not receive a strictly literal interpretation, but ought to be construed as meaning that all personal property having a permanent *situs* in this State, notwithstanding the owner may reside in another State, shall be subject to taxation in this State.

In the light of the authorities cited as above, the staves claimed to have been unlawfully taxed had lost their *situs* as taxable property in this State, and were, in legal contemplation, at the time they were assessed, *in transitu* from the points at which the appellant had purchased them, to Cleveland, Ohio, the place of their ultimate destination. They had then become, under our American system of taxation, a part of the taxable property of the State of Ohio. It follows that the staves were not subject to taxation in this State, and that they were hence improperly listed for taxes by the assessor of Wells county.

This conclusion works no injustice, as the appellant had presumably given the value of the staves in exchange for them previous to the time of their assessment. It has been insisted in argument that the conclusion at which we have ar-

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rived could not be reached without practically overruling the cases of *Powell v. City of Madison, supra*, and *Rieman v. Shepard, supra*. Those cases, however, recognize the rules governing the taxation of personal property to be as herein quoted from Burroughs, but have an application to facts materially different from those involved in this case.

The case of *Carrier v. Gordon*, 21 Ohio St. 605, is cited as a case parallel in its facts with the one at bar, and as sustaining a conclusion different from the one we have reached at the present hearing. But in that case the petition did not show that the timber had in any sense started on its journey from the respective places at which it had been purchased, and in that respect, at least, there was a material difference between the two cases.

The three cases lastly above named make what appears to us to be an extreme application of the taxing power of the State, and are cases which we would not in any event feel inclined to follow very strictly.

The judgment is reversed, with costs, and the cause remanded for further proceedings.

No. 10,036.

MILLION ET AL. v. THE BOARD OF COMMISSIONERS OF CARROLL COUNTY ET AL.

FREE TURNPIKE Roads.—Act of March 3d, 1877.—County Board.—Judicial Powers and Duties.—Decisions and Orders.—Collateral Attack.—Under the act of March 3d, 1877, "authorizing boards of county commissioners to construct gravel, macadamized, or paved roads, upon petition," etc., which should be "free of toll" (sections 5091 to 5103, R. S. 1881), such county boards are clothed with original jurisdiction, and are required to exercise judicial powers and duties in relation to the location, establishment and construction of such free roads; and the decisions and orders of such county boards, in proceedings instituted under such act, are not the subjects of collateral attack, but are conclusive and final except upon an appeal therefrom to the circuit court of the county.

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Million et al. v. The Board of Commissioners of Carroll County et al.

SAME.—*Omitted Lots or Lands.—Addition and Re-apportionment.—Change in Improvement.—Power of County Board.*—Under section 5095, R. S. 1881, the county board is authorized, after the final order for the improvement has been made, where there has been an omission of benefited lots or lands from the assessment, to make such addition and re-apportionment as it may deem just and proper, and such change in the improvement as will conform the same to public requirement.

SAME.—*Informality, Error or Defect.—Complaining Party.—Complaint.*—Under section 5102, R. S. 1881, the party complaining of any informality, error or defect appearing in the record of the county board, in any such proceeding, must show in his complaint that he is injuriously affected thereby, and in what respect, and that the same can not be corrected by the county board, before he can be permitted to take advantage of such informality, error or defect, by an action in the circuit court.

From the Carroll Circuit Court.

J. Applegate and C. R. Pollard, for appellants.

— Nelson and — Odell, for appellees.

Howk, J.—In this case the joint demurrer of the appellees, the defendants below, to the appellants' complaint, upon the ground that it did not state facts sufficient to constitute a cause of action, was sustained by the court. To this ruling the appellants excepted, and, refusing to amend their complaint, the court rendered judgment against them for the appellees' costs, and that they take nothing by their suit herein.

In this court the only error assigned by the appellants is the decision of the circuit court in sustaining the demurrer to their complaint.

The appellants, forty-three in number, alleged in substance in their complaint, that they, the appellants, were the owners respectively of real estate in Carroll county, Indiana, upon which the appellee, the board of commissioners of said county, had assumed to levy a tax for the construction of a gravel road, and to that end had assessed against each of the appellants, and his real estate, particularly described, the sum following his name and the particular description of his real estate; that, without the knowledge or consent of the appellants, or any of them, the appellee, the board of commissioners,

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had caused all said assessments against their said lands and against the appellants to be placed upon a special duplicate, provided by the auditor of Carroll county, and had caused such duplicate to be placed in the hands of the appellee, the county treasurer; that such duplicate was still in the hands of such county treasurer; that the board of commissioners had ordered and directed the county treasurer to proceed to collect said assessments, by levy, sale and distraint of the appellants' property, and by sale of the lands upon which the assessments were made, if necessary; that the appellee, the county treasurer, threatened, and, unless restrained by the order of the court, would at once proceed, to collect such assessments according to law, and according to the order of the appellee, the board of commissioners, whereby the appellants would be deprived of their lands, and would suffer great and irreparable injury.

The appellants further alleged that the said assessments were illegal, fraudulent and void, for the following reasons:

1st. Because the appellee, the county board, did not at any time acquire jurisdiction, for the reason that the petition presented to the board was not signed by five land-holders whose lands would or could be assessed for the cost of the improvement; that the petition did not state the kind of improvement prayed for; that upon the presentation of such petition, and upon the filing of a bond, the county board did not appoint three disinterested freeholders of the county as viewers; that three viewers were appointed and directed to meet at the office of the county auditor, on August 2d, 1880, but notice was not given by publication, in a newspaper printed in the county, for three consecutive weeks next prior to said meeting, of the time and place thereof; that the only publication made terminated on July 21st, 1880, and, after that day, it was not published in any newspaper printed in the county; that the notice so given did not state the kind of improvement prayed for; that the viewers so appointed met at the auditor's office, upon the day appointed, and assumed to enter upon the dis-

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charge of their duties as such, but failed, neglected and refused, then and afterwards, to take an oath or affirmation faithfully and impartially to discharge the duties of their appointments respectively ; that the viewers did not view, examine, lay out or straighten the road prayed for, as, in their opinion, public utility and convenience required ; nor, in doing what they did in the premises, did they pay any regard to public utility and convenience, but, in so far as in their power, attempted to establish the road strictly in accordance with the petition ; that the viewers assessed no damages in consequence of the taking of private property, for the making of said improvement, to any minor, idiot, or lunatic ; that at the next regular session of the county board the viewers made a report to the board, but the surveyor or engineer did not join in such report ; that the report failed to show whether there was any or what public necessity for the contemplated improvement, and what lots or lands would be benefited thereby ; that upon the return of said report, and a petition for the improvement signed by many persons, the county board entered upon its record an order that the improvement be made, and directed the establishment of a road upon the line and between the points prayed for, and directed that it should be constructed of gravel, sixteen feet in width and fifteen inches in depth. And the appellants averred that a large majority of the signatures so appended to said petition were not made to the petition so presented, but were made to another and different paper writing, and were, without their knowledge or consent, detached from said paper writing and attached to said petition, which fact was unknown to the appellee, the county board, at the time they acted upon said petition, and, therefore, they assumed all the signatures so appended to the petition to be genuine signatures thereto, and heard no proof upon the question, and were thus and thereby deluded and defrauded.

And the appellants alleged that for the fraudulent purpose of making it appear that a majority of the resident land-holders of the county, whose lands were to be benefited by,

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and ought to be assessed for, said improvement, and that the owners of a majority of the whole number of acres of land had signed said petition, the viewers omitted in their report the names of fifty land-holders, resident along the proposed improvement, whose lands would be benefited thereby, and who ought to be assessed, and also omitted from their report 5,000 acres of land, lying along and within two miles of the proposed improvement, and which would be benefited thereby, and, in like manner, omitted the names of all land-holders and all lands lying south of the southern extremity of said proposed road, and within two miles thereof, although there were at such extremity, and within two miles thereof, 1,000 land-holders and 4021 acres of land, all of whom and which would be benefited by the proposed improvement; that if said viewers had fully and truly reported all land-holders and all lands which lay within two miles of the proposed improvement, it would at once have been apparent that only a very small minority of the resident land-holders, to be benefited by the improvement and within two miles thereof, had signed said petition, and that only a minority of the owners of the whole number of acres to be benefited by the improvement and within two miles thereof had petitioned for such improvement; that a majority of the resident land-holders of the county, whose lands were reported as benefited and as liable to be assessed, and a majority of the owners of a majority of the whole number of acres of all lands that were reported as benefited and liable to be assessed, were found as subscribers to the petition only by counting, as a subscriber and petitioner for such improvement, one Abner H. Bowen, a resident land-holder of the county, who owned many thousands of acres of lands within two miles of the proposed improvement, upon the east side of the Wabash river, all of which would be benefited and ought to be assessed for such improvement; that the said Abner H. Bowen subscribed the petition solely upon condition that his lands should not be assessed for the expenses of said improvement, but that the expenses thereof,

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which should be borne by his lands under the law, should be borne, under his contract with the board of commissioners, by the lands of the appellants and others.

The appellants further said that the petition was not, and did not purport to be, signed by a majority of the resident land-holders of the county, whose lands would be benefited and would be liable to assessment, nor by the owners of a majority of the whole number of acres of all lands that would be benefited and liable to assessment, but the same was signed only by the legal representatives of such land-holders and lands, or by persons who described themselves as such representatives in the petition ; that the signers of said petition were not the legal representatives of the real estate within two miles of the proposed road, and of a majority of the resident land-holders of the county, whose lands would be benefited and subject to assessment, and were not the legal representatives of the owners of a majority of the whole number of acres of land which would be benefited and ought to be assessed ; that said petitioners were not the legal representatives of any person who had a right to be heard in reference to the contemplated improvement, and, if they had been such representatives, they acquired thereby no right to petition for said road, and conferred upon the county board no jurisdiction to order said improvement by such petition.

2d. Because the board of commissioners, after it had entered upon its record an order that the improvement be made, stating the kind of improvement to be a bed of gravel, 16 feet in width and 15 inches in depth, advertised for and received bids for the construction of the improvement ; but, because none of said bids were within the amount of benefits assessed, they refused to and did not accept any of them, and refused to and did not advertise for other bids for the construction of such improvement ; that, although public necessity and requirement did not demand any change in the manner of the improvement as ordered, and although the board did not find or adjudge that there was any such public neces-

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sity or requirement for alteration in the manner of the improvement, and made no order or record for such alteration, yet the board assumed to and did let the contract afterward for another kind of improvement, to wit, for a bed of gravel but 9 feet in width and only 12 inches in depth, except upon that portion of the road between the corporate limits of the city of Delphi and the iron bridge across the Wabash river, about one-half mile, where the depth of the gravel was to remain 15 inches; that such alteration in the width and depth of the gravel bed was wholly opposed to public interest, necessity and requirement, and that the road, thus constructed, will not be adequate to the wants of the public, who were accustomed to and would have occasion to travel thereon, and would be of no public utility whatever. Wherefore the appellants asked that all the proceedings relative to the proposed improvement might be declared fraudulent, null and void, and the board of commissioners be prohibited from taking any further action in the premises; that the treasurer of Carroll county be forever enjoined from collecting or attempting to collect said assessments; that the entry thereof, upon the special duplicate as aforesaid, be declared void and of no effect; that it be judicially declared and determined that the assessments so entered upon such duplicate constitute no lien whatever upon the lands against which they were assessed, and that they have other proper relief.

This suit was commenced by the appellants on the 15th day of April, 1881. From the facts stated in the complaint it is manifest that the proceedings, of which the appellants complain, were had by and before the board of commissioners of Carroll county, under the provisions of the act of March 3d, 1877, authorizing county boards "to construct gravel, macadamized, or paved roads, upon petition of a majority of resident land-owners along and adjacent to the line of any road," etc. Acts 1877, Reg. Sess., p. 82, sec. 5091, *et seq.*, R. S. 1881. Section 1 of the act referred to (sec. 5091, R. S. 1881) provides that "The board of commissioners of any county in

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this State shall have power, as hereinafter provided, to lay out, construct, or improve, by straightening, grading, draining (in any direction required to reach the most convenient and sufficient outlet), paving, gravelling, or macadamizing any State or county road, or any part of such road, within the limits of their respective counties."

Section 2 of the same act (sec. 5092, R. S. 1881) reads as follows: "Upon the presentation of a petition stating the kind of improvement prayed for, and the points between which the same is asked, signed by five or more of the land-holders whose lands will be assessed for the cost of the improvement, and the filing of a bond, signed by one or more responsible freeholders, to whom the petitioners shall be responsible *pro rata*, conditioned for the payment of the expenses of the preliminary survey and report, if the proposed improvement shall not finally be ordered, the board of commissioners shall appoint three disinterested freeholders of the county as viewers, and a competent surveyor or engineer to proceed, upon a day to be named by the commissioners, to examine, view, lay out, or straighten said road, as in their opinion public convenience and utility require."

We are of opinion that under the provisions of the aforesaid act of March 3d, 1877, the boards of commissioners of the several counties in this State are clothed with original jurisdiction and required to exercise judicial powers and duties in relation to the location, establishment and construction of free gravel, macadamized or paved roads in their respective counties. It is clear, therefore, that, in the matters complained of in the case in hand, the board of commissioners of Carroll county had jurisdiction of the subject-matter of the petition mentioned in the appellants' complaint. The presentation of this petition called into exercise the jurisdiction of the county board, and required the board to determine the question of the sufficiency of the petition, in form and substance, and whether or not such petition was signed by the requisite number of land-holders, whose lands would be assessed for

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the cost of the proposed improvement, and every other fact, precedent or concurrent, necessary to the granting of the prayer of the petition. Nor was it necessary, we think, that the finding of these jurisdictional facts by the county board should be shown by its record, in express terms. It was enough if it appeared that upon the presentation of the petition and the filing of the proper bond, the county board appointed viewers and a surveyor or engineer to proceed as required by the statute. In *Bittinger v. Bell*, 65 Ind. 445, this court said: "It is not to be expected that the orders of a board of commissioners will be drafted with that degree of legal accuracy and precision of statement usually found in the orders, decrees and judgments of the circuit court. There are no established forms or precedents for the orders of a board of commissioners; and, if those orders are right in substance, their form will be of little consequence."

It was shown by the complaint in the case now before us that the board of commissioners of Carroll county, upon the presentation of the petition and the filing of the bond, did appoint three viewers, and directed them to meet, on a day named, at the office of the county auditor. In *Stoddard v. Johnson*, 75 Ind. 20, a case very much like the case in hand, and in which substantially the same relief was sought against proceedings had under the aforesaid act of March 3d, 1877, it was held by this court that "when an inferior tribunal is required to ascertain and decide upon facts essential to its jurisdiction, its determination thereon is conclusive as against collateral attack, and that, in such proceedings as that under consideration, the filing or presentation of the petition calls into exercise the jurisdiction of the board, and authorizes that body to determine, not only whether the petition is properly signed by the requisite land-owners, but every other fact necessary to the granting of the prayer of the petition; for instance, in this case, whether the proposed improvement, its kind, and the points between which it was to be made, and the like, were sufficiently stated. And it is not

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necessary that the record of the board shall show an express finding upon such facts. Such finding will be presumed in support of the proceedings, if the record shows an order granting the petition or for the taking of the steps necessary to the accomplishment of the end designed. In this case the order for the appointment of the viewers and engineer, and fixing the time and place of their meeting, is equivalent to a finding of the facts necessary to have been found, and to an adjudication of the board, that the petition itself is sufficient. By the presentation of the petition, the judgment of the board upon its sufficiency was invoked, and their judgment in this respect, as much as in other respects, is exempt from collateral attack."

The doctrine here declared is fairly deducible from, and fully accords with, the law as expressed in a long line of decided cases in this court. *Evansville, etc., R. R. Co. v. City of Evansville*, 15 Ind. 395; *Snelson v. State, ex rel.*, 16 Ind. 29; *Spaulding v. Baldwin*, 31 Ind. 376; *Dequindre v. Williams*, 31 Ind. 444; *Ney v. Swinney*, 36 Ind. 454; *Pendleton, etc., Turnpike Co. v. Barnard*, 40 Ind. 146; *Worthington v. Dunkin*, 41 Ind. 515; *Gavin v. Graydon*, 41 Ind. 559; *Curry v. Miller*, 42 Ind. 320; *Board, etc., v. Markle*, 46 Ind. 96; *Evans v. Clermont, etc., G. R. Co.*, 51 Ind. 160; *Markle v. Board, etc.*, 55 Ind. 185; *Faris v. Reynolds*, 70 Ind. 359; *Board, etc., v. Hall*, 70 Ind. 469; *Miller v. Porter*, 71 Ind. 521; *Mullikin v. City of Bloomington*, 72 Ind. 161; *Hume v. Little Flat Rock Draining Association*, 72 Ind. 499; *Porter v. Stout*, 73 Ind. 3; *Houk v. Barthold*, 73 Ind. 21; *Muncey v. Joest*, 74 Ind. 409.

The doctrine declared in the cases cited is decisive of many of the questions attempted to be raised in the case at bar, adversely to the appellants. It establishes clearly and conclusively that the board of commissioners of Carroll county acquired and held complete jurisdiction of all the proceedings of which the appellants complain; and having acquired such jurisdiction over the subject-matter and the parties, the same liberal presumptions must be indulged in favor of the regularity and legality of the orders and proceedings of the county

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board as are always indulged in favor of the judgments and proceedings of courts of general jurisdiction. Such orders and proceedings of the county board, in such a case, must be held to be final and conclusive, even though erroneous, and they can not be attacked in a collateral action such as the one now before us.

In section 5 of the aforesaid act of March 3d, 1877 (sec. 5095, R. S. 1881), it is provided that if, at any time after making the final order for the improvement, "the commissioners shall find that there has been an omission of lots or lands within the territory sought to be assessed, or that there has been manifest injustice in the apportionment of taxes, or that public necessity requires any alteration in the manner of the improvement as ordered, they are authorized to make such addition and reapportionment as they may deem just and proper and such change in the improvement as will conform the same to the public requirement." In *Ricketts v. Spraker*, 77 Ind. 371, in speaking of this provision of section 5, the court said: "The statute confers ample authority upon the commissioners to make all needed corrections and to supply all omissions. * * * .* * For anything that appears, the commissioners may have added to the assessment roll the lands alleged to have been omitted. The presumption is that they did their duty and placed all the lands upon the list. It was at least incumbent upon the appellants to show, not only that the committee omitted lands, but that other public officers did not supply the omission." So, also, in *Stoddard v. Johnson, supra*, the court said: "The complaint charges numerous errors and defects in the reports of the original viewers, and of the committee of apportionment; as, for instance, that benefited lands had been omitted, and other tracts so defectively described as that the assessments made thereon were void. It is evident, however, that these and the like objections do not affect the jurisdiction, and, if true, constitute errors and irregularities which the law expressly authorizes the board to correct at any time."

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It will be seen from the provision above quoted of section 5 that the alleged change in the proposed improvement by the county board was fully authorized by the statute. It will be presumed that the county board found, even if there be no record of such finding, that public necessity required the alteration in the manner of the improvement, and that the board made the change in the improvement to conform the same to the public requirement.

In the closing sentence of section 2 of the act (sec. 5092, R. S. 1881), it is provided that "The county auditor shall notify said viewers and surveyor of the time and place of their meeting to make said view, and shall also give notice, by publication in a newspaper printed in said county for three consecutive weeks, next prior to said meeting," etc. In this case it is conceded in appellants' complaint that notice was given by publication in a newspaper printed in the county, for three consecutive weeks; but it is claimed that the three weeks were not "next prior to said meeting." On this point it appears from the allegations of the complaint that between the close of the third week's publication and the day of the meeting a few days intervened. We think the publication of the notice was sufficient. *Muncey v. Joest, supra.*

In section 12 of the aforesaid act (sec. 5102, R. S. 1881), it is provided as follows:

"No person shall be permitted to take advantage of any error committed in any proceeding to lay out, construct, or improve any road under and by virtue of this act; nor of any error committed by the county commissioners or by the county auditor, or by the engineer or surveyor or other person or persons in the proceedings to lay out, construct, or improve any such road; nor of any informality, error, or defect appearing in the record of such proceeding, unless the party complaining is affected thereby."

Under this provision of the statute it is not enough for the complaining party to show that he is affected by the proceeding to lay out, construct or improve any road, but he must clearly

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show, we think, that he is injuriously affected, and in what respect, by the informality, error or defect, of which he complains, in any such proceeding, and that the same can not be corrected by the county board, before he can be permitted to take advantage thereof by an action in the circuit court. No such showing was made, or attempted to be made, by the appellants in their complaint; although they pointed out therein many informalities, errors and defects, appearing in the record which the county board was fully authorized to correct, and claimed that the entire proceeding was thereby rendered void.

Our conclusion is that the court committed no error in the case at bar in sustaining the demurrer to the appellants' complaint.

The judgment is affirmed, with costs.

No. 10,228.

FITZPATRICK ET AL. v. PAPA.

MARRIED WOMAN.—*Mortgage.*—*Husband and Wife.*—Suit against husband and wife to foreclose a mortgage made by them while the act of 1879 (Acts 1879, p. 160) was in force. Answer by the wife, that she owned the land by gift, and that the mortgage was made to secure a debt of the husband. Reply that the mortgage was made in consideration of the release of the land from a former mortgage, and the extension of the time of payment. *Held*, that the reply was good.

NEW TRIAL.—*Error.*—The granting of a new trial is available error only when it is plain that flagrant injustice has been done thereby.

SAME.—*Effect of.*—A new trial sets aside not only a general verdict, but also answers of the jury to interrogatories.

TRUST AND TRUSTEE.—*Innocent Purchaser.*—*Parol Trust.*—*Mortgage.*—As against a mortgagee in good faith a trust in favor of another than the mortgagor can not be established by parol.

PRACTICE.—*Evidence.*—*Objection.*—*Supreme Court.*—Only such objections to evidence admitted as have been stated below can be made in the Supreme Court, and the objection must be specific and not vague or too general, as that a deposition "was not properly and legally certified."

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SAME.—*Evidence.*—A party can not divide his evidence in proof of a fact, and give part of it in chief and the other part in rebuttal.

SAME.—*Cross Complaint to Quiet Title.*—In a suit to foreclose a mortgage, if a defendant file a cross complaint to quiet title, the general denial will, under the statute, admit proof of any defence to the cross complaint.

DEPOSITIONS.—*Notice.*—*Judicial Knowledge.*—The Supreme Court takes judicial knowledge, that a notice at Ft. Wayne, served December 20th, to take depositions at Topeka, Kansas, on the 26th of the same month, gives sufficient time.

ATTORNEYS' FEES.—A party undertaking to pay attorneys' fees, with the principal debt, is liable for such increase thereof as he causes by making defence.

From the Allen Circuit Court.

L. M. Ninde and T. E. Ellison, for appellants.

A. Zollars and J. J. Jenkinson, for appellee.

ELLIOTT, J.—Appellee's complaint counts on a note and mortgage. The answer of appellant Elizabeth Fitzpatrick alleges that at the time the note and mortgage were executed she was the wife of her co-defendant; that no part of the consideration for which they were executed moved to her, but they were executed to secure a debt due from her husband, and that she was the owner, by gift and devise, of the real estate described in the mortgage. The second paragraph of the reply avers that the consideration of the note and mortgage was the surrender of a former mortgage lien, the dismissal of a foreclosure suit, and the extension of the time of payment of the debt.

At the time the note and mortgage were executed the act of 1879 was in force, and it is claimed that the reply is bad, because that act prohibited a married woman from encumbering her property as security for a debt of her husband. Acts 1879, p. 161.

The consideration for the note and mortgage was the release of a subsisting lien, and this was a valid consideration. A married woman who executes a mortgage to secure the release of a valid lien can not escape the consequences of her act upon the ground that the mortgage was executed to secure the debt

Fitzpatrick et al. v. Papa.

of the husband. The benefit moves to her, for it relieves her property from a burden.

It is no doubt true that a married woman can not be deprived of her property upon the ground that she has performed acts which if done by one not under disability would constitute an estoppel *in pais*, but this principle has no application to a case like this. The appellee is not proceeding on the theory that there is an estoppel, but on the theory that the release of the lien of the first mortgage constituted an adequate consideration for the second.

The rule laid down in *Busenbarke v. Ramey*, 53 Ind. 499, and cases following it, does not apply where the creditor, in good faith and without notice, parts with a valid lien. Where there is a material change of position by the release of a subsisting lien on real estate, the creditor is entitled to protection upon the same general principle that *bona fide* purchasers are protected. The antecedent debt is always a valuable consideration, but the transfer of property upon that consideration will not always constitute the vendee a *bona fide* purchaser. *Hewitt v. Powers*, 84 Ind. 295; *Louthain v. Miller*, 85 Ind. 161. If to the debt is added the further element that a valid lien is in good faith and without notice parted with, then the case comes within the rule which protects *bona fide* purchasers. The pleadings in this case show the appellee's case to be within the rule.

The action of the trial court in granting a new trial will not be reviewed unless the complaining party makes a strong case, so strong as to convince the appellate court that "flagrant injustice has been done." *Daggett v. Flanagan*, 78 Ind. 253; *Leary v. Ebert*, 72 Ind. 418; *Collingwood v. Indianapolis, etc., R. W. Co.*, 54 Ind. 15. This is very far from such a case.

In the trial preceding the one which resulted in the judgment appealed from, answers to interrogatories were returned upon which appellants insist they are entitled to judgment. The order granting the new trial disposed of the answers to interrogatories as well as all the other incidents of the former trial.

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On the trial the appellants offered to prove what was said by appellant Elizabeth Fitzpatrick's father at the time he executed the conveyance to her husband. The deed to the husband was complete on its face, and assumed to vest an absolute title in the grantee, and, as against an innocent purchaser, a contemporaneous agreement can not impair a title so created. The appellee took his first mortgage in good faith, parted with a valuable consideration, and his rights can not be impaired by a secret trust.

An express trust can not be created by parol. It is true that where the one party at the time of the purchase pays the consideration and title is taken by the other, with an agreement to hold for the person furnishing the consideration, a valid trust will result; in such a case, however, the trust is not created by the parol agreement, but results from the acts done by the parties. *Boyer v. Libey*, 88 Ind. 235. A trust so created is valid and enforceable between the parties, but can not prevail against a good faith purchaser without notice, and in that position the appellee stands.

A party must state his objections to evidence to the trial court, and it is only such objections as are there presented that can be considered on appeal. We can, therefore, consider only the objections stated to the court below.

It was objected to the deposition of appellee's witness Snow, that "the same was not properly and legally certified." We deem this objection too general and vague to present any question. It is necessary to point out with reasonable certainty the specific grounds of objection. *Murray v. Phillips*, 59 Ind. 56; *Manning v. Gasharie*, 27 Ind. 399.

The notice to take the deposition was served on the 20th of December, and the time appointed for taking the 26th of the same month, and the place Topeka, Kansas, and as we know judicially the time required to travel from Fort Wayne to that place, we can not say that the notice was not sufficient.

It was proper for appellee to prove the execution of the former mortgage, its release and attendant circumstances, for

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the purpose of showing the consideration of the note and mortgage sued on. Where there are conflicting claims to property, and one of the claimants founds his claim upon his good faith and want of notice, it is proper for him to prove the circumstances under which he acquired his interest and the consideration it cost him.

After the close of the appellee's evidence, and in reply to it, the appellant offered to prove that the appellee induced Elizabeth Fitzpatrick to sign the mortgage by threatening to send her husband to the penitentiary for having forged her name to the first mortgage, but the court excluded the evidence. The general rule is, that a party can not divide his evidence into two parts, give one in chief and the other in rebuttal, but, if he undertakes to go into a subject originally, he must then present all his evidence upon the points involved. *York v. Pease*, 2 Gray, 282; *Ashworth v. Kittridge*, 12 Cush. 193; 1 Greenl. Ev., section 74. Of course this rule does not apply where a matter is incidentally touched upon by the evidence in chief, but it does apply where the subject is directly entered upon. Trial courts have broad discretion in the matter of admitting rebutting evidence, and appellate courts will be slow to interfere with this discretion, and in the present case we can not say that there was an abuse of discretion in refusing to receive this evidence at the time it was offered. As the rule stated disposes of the point, we deem it unnecessary to enquire whether the evidence was either relevant or material.

It is proper to make an issue involving the title to land in actions to foreclose mortgages. *Ewing v. Patterson*, 35 Ind. 326. It is, indeed, the general rule that one made a party to an action to foreclose a mortgage, and challenged to assert his interest in the mortgaged premises, must, by a proper pleading, aver his title. *Ulrich v. Drischell*, 88 Ind. 354.

A cross complaint filed in a foreclosure suit, asserting a title to the land described in the mortgage, is essentially an action to quiet title. If the cross complainant succeeds, it is upon the ground that he owns a title which he is entitled to

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have quieted. The issue he tenders is one of title. If the plaintiff should dismiss his action the cause would still stand for trial upon the cross complaint, and then the only issue would be as to the validity and rank of the title claimed by the cross complainant. It follows that the pleading and practice in such cases must be essentially the same as in actions instituted to quiet title to land, and so the cases declare. *Ewing v. Patterson, supra; Board, etc., v. Lafayette, etc., R. R. Co.*, 50 Ind. 85. The appellee was, therefore, entitled to give in evidence, under the general denial, all legitimate matters of defence to the cross complaint.

As the general denial pleaded to the cross complaint entitled the appellee to prove all defences, it was proper for him to give evidence tending to show that the conveyance upon which the asserted title was founded was fraudulent, and, as it was proper to give this evidence, it was proper for the court to instruct upon that subject.

It is not improper for the court to state hypothetically facts and instruct the jury as to the law applicable to such facts. This is the rule even in cases where the question is whether a conveyance was or was not fraudulent. We have examined the evidence and regard it as amply sufficient to support the verdict.

Where a party undertakes to pay attorney's fees, and by contesting the claim, although successful in securing verdicts in some intermediate trials, increases the cost and expense, he is liable for the enhanced fees. The right to recover the debt depends upon the final judgment of the court, and is not affected by intermediate verdicts which have been set aside by the court. A verdict without a judgment is of no force in such a case. The final judgment concludes the parties and determines their rights; not intermediate verdicts, which the court has declared to be not sufficiently supported or not in accordance with the law.

Judgment affirmed.

ZOLLARS, J., having been of counsel, took no part in the consideration of this case.

The Physio-Medical College *et al.* v. Wilkinson *et al.*

No. 9919.

THE PHYSIO-MEDICAL COLLEGE ET AL. v. WILKINSON ET AL.**NEW TRIAL.—Application for as of Right.—Action to Quiet Title.—What is.—**

New Trial.—The nature of a suit depends on the complaint and judgment, and not on the judgment alone. A complaint by heirs at law to set aside a deed of their ancestor, and praying to quiet their title to the lands, is a complaint to quiet title, in which a new trial as of right may be granted, under section 1064, R. S. 1881.

SAME.—Practice.—Case Overruled.—A new trial as of right, under the statute, may be applied for either orally or in writing. *Crews v. Ross*, 44 Ind. 481, overruled.

- From the Hamilton Circuit Court.

J. Young, W. P. Atkinson, W. Wallace and L. Wallace, for appellants.

J. Roberts, D. Moss and R. R. Stephenson, for appellees.

ZOLLARS, J.—The questions presented by the record and discussed by counsel are: *First.* Are appellants entitled to a new trial without cause, as a matter of right, under the statute? *Second.* If so, did they make the proper application to the court below? The case was tried upon the third paragraph of the complaint, which states substantially that appellees are the only heirs of one Margaret Wilkinson, who died intestate in May, 1877; that on the 11th day of April, 1874, she was the owner in fee of the real estate described in the complaint, and on that day executed a deed of conveyance for said real estate to appellant, the Physio-Medical College, of which corporation the other appellants are officers; that at the time of the execution of the deed the said Margaret Wilkinson was eighty years of age, greatly enfeebled in body, was of unsound mind, and incapable of contracting, or understanding and comprehending the nature and purpose of a contract or of said deed; that no consideration was paid for the real estate, although it was of the value of \$14,000; that previous to the institution of this action appellees gave appellants notice of a disaffirmance of said conveyance on account of the

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mental unsoundness of said grantor, and demanded possession of said real estate, and claiming title thereto by reason of said deed of conveyance. Wherefore the plaintiffs pray judgment that said deed of conveyance be set aside and held for naught; that the plaintiffs have possession of said real estate; that their title be quieted thereto, and for all other proper relief.

To this paragraph there was a general denial. The verdict of the jury was: "We, the jury, find for the plaintiffs."

The judgment of the court upon the verdict is that the deed "be and the same is hereby set aside and held for naught, as completely as if the same had never been made, and that the plaintiffs recover of the defendants all their costs herein laid out and expended, taxed at — dollars and — cents."

The judgment was rendered at the April term, 1881, of the Hamilton Circuit Court. At the November term following the appellants made their application for a new trial as of right, without cause. This motion the court overruled; appellants excepted, have appealed, and assign the ruling for error.

The position of appellees' counsel is that appellants are not entitled to a new trial as of right, for the reason that the action is neither for the possession of, nor to quiet the title to, real estate; that it is simply to set aside the deed on account of the mental unsoundness of the grantor, and has no reference to the title to the land. In this we do not agree with counsel. It is a proper case in which to ask for the quieting of the title, and in which to compel the opposite party to assert his title. It is true that, generally, the prayer does not control the statement of facts in the complaint, but in a case like this, where the prayer is consistent with the facts stated, it is proper to consider it with the facts stated, to determine the nature and character of the action. A part of the relief prayed for, as will be seen, is that the title be quieted. It is very patent, also, that, aside from the prayer, the title to the land is involved in the litigation. It is manifest that if the

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appellant College is not the owner of the land by virtue of the deed, the title is in appellees, as the heirs of the grantor. The disposition of the deed which carried the legal title to the college will determine where that title shall finally rest—whether in appellees or the college. It is contended that in determining the nature of the action we should look alone to the judgment rendered, which, as counsel say, makes no mention of the title. We do not think so. The case, as made by the pleadings and tried between the parties, must determine the character of the action. This case serves as a good illustration of the evil consequences which would follow the adoption of the rule contended for. Looking to the judgment alone, it could not be told for what reason the deed was set aside—whether on account of the mental unsoundness of the grantor, for fraud in its procurement, to subject the land to the payment of debts, whether appellants were claiming any rights under it, or whether appellees have, or claim, any interest in the land. It not infrequently happens that judgments are in a measure meaningless without reference to the pleadings. See *Hopper v. Lucas*, 86 Ind. 43.

If the judgment were so full and explicit as to show the nature of the action, it might not be necessary for us to look to the pleadings.

Section 1070, R. S. 1881, which is the same as section 611 of the code of 1852, provides that "An action may be brought by any person either in or out of possession, or by one having an interest in remainder or reversion, against another who claims title to or interest in real property adverse to him, although the defendant may not be in possession thereof, for the purpose of determining and quieting the question of title."

In the case of *Shucraft v. Davidson*, 19 Ind. 98, the heirs set up that Davidson obtained a deed for the land from the ancestor, without consideration, when he was "*non compos*," and hence incapable of making a deed; and prayed that the title to the land be adjudged to be in them by descent, etc. There was judgment for the defendant, and the court below

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refused a new trial as of right. In the opinion of the court it is said: "It was a suit in which the party complainant, by virtue of the judgment in the suit, sought to vest or quiet title to real estate in herself," etc.

We think that the case in hearing is covered by this case, that it is clearly within the statute, and that appellants are entitled to a new trial unless they are barred by the second objection urged by appellees. See, also, *Zimmerman v. Marchland*, 23 Ind. 474; *Hunter v. Chrisman*, 70 Ind. 439.

At the time appellants made their motion for a new trial they tendered the bond required by section 1064, R. S. 1881, which was approved by the court. The motion was in writing, and is as follows:

"STATE OF INDIANA, HAMILTON COUNTY, ss.:

"WILLIAM WILKINSON ET AL.

vs.

"THE PHYSIO-MEDICAL COLLEGE ET AL.

} No. 4541.

"To the Honorable Judge of the Hamilton Circuit Court:

"The defendants, by Young and Wallace, their attorneys, now make application for a new trial herein as provided by statute, as a matter of right. The said defendants accompany this application by an undertaking to pay all costs and damages, which they ask may be approved.

"JOHN YOUNG,

"WM. WALLACE,

"Attorneys for Defendants."

It is contended by appellees' counsel that the motion in such cases must be in writing, and that the above is defective, because it does not show when the judgment sought to be vacated was rendered; that the case is not one in which a new trial may be had as of right, and the motion is not accompanied by the pleadings or judgment. In support of their position they cite Buskirk *Prac.*, and the case of *Crews v. Ross*, 44 Ind. 481, in which BUSKIRK, J., said: "It is well settled that there must be a written motion or supplemental complaint. * * The application should, at least, show the rendition of the judgment

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in the cause, the time when rendered, that all the costs had been paid, and that a new trial was demanded as of right without cause."

This is the whole of the discussion by the learned judge, and it is apparent that he had not given the subject very mature thought, and this for the reason, perhaps, that it was not the important question in the case. He based his conclusion upon the cases of *Starry v. Winning*, 7 Ind. 311; *Shuman v. Gavin*, 15 Ind. 93; *Falls v. Hawthorn*, 30 Ind. 444; and *Bissell v. Wert*, 35 Ind. 54.

The case of *Starry v. Winning*, *supra*, is not authority for the purpose cited. In that case the party did not bring himself within the statute, by the payment of costs, and for aught that appears did not ask for a new trial under the statute in the court below, verbally or otherwise.

In the case of *Shuman v. Gavin*, *supra*, the party asking a new trial as of right filed a written motion or complaint, which was questioned by demurrer. The court, without deciding whether or not such written motion was necessary, held that the one in question was sufficient, as it clearly was.

In the case of *Falls v. Hawthorn*, *supra*, nothing is said as to what such a motion should contain, or whether or not it should be in writing.

The case of *Bissell v. Wert*, *supra*, has no possible bearing upon the question, as it was an action for work and labor.

Thus it will be seen that the cases cited by the learned judge do not support the rule announced in 44 Ind., and in his excellent work on practice.

It will be seen upon an examination of the statute that it does not require the application to be in writing, or in any particular form. Section 1064, R. S. 1881.

In the case of *Zimmerman v. Marchland*, *supra*, this court, per FRAZER, J., in speaking of the statute, said: "The setting aside of the first judgment, and granting the new trial, is claimed to be erroneous on several grounds. *First*, because the motion was not in writing. But the statute does not so

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require, and besides, the failure to put it in writing could not injure the defendant. And yet it would probably be better to require all such motions to be in writing."

We think, also, that the better practice would be to put such motions in writing, but our ideas of propriety can not be allowed to deprive a party of his right to a new trial, because he may not have reduced his motion therefor to writing, when the statute does not require it. It is the province of the Legislature to enact laws and ours to interpret them. This right, like the right to have judgments reviewed in certain cases, and a new trial for cause after the expiration of the term at which the judgment is rendered, is statutory, but there is no such analogy as to require us to hold a written application necessary in this because required in the other proceedings. In those cases the statute requires in express terms that the application shall be in writing. If it should be held that a written application is required in this case, from analogy to the other proceedings, there is no good reason why it should not also be held that the application should be accompanied by a full transcript of the judgment and proceedings sought to be vacated.

If it be held that the application must be in writing, on the ground that the case has passed from the "bosom of the court" after the term, then it would seem to follow that the application should be accompanied by a full transcript of the case in order that the court may have full knowledge. If the court must be enlightened by a written application and showing, as to any part of the proceeding, it would seem reasonable that the showing should be such as would put the court in possession of all the facts and proceedings to enable it to judge of the nature of the case, and to decide whether or not it is a case in which a new trial is given as a matter of right.

If this practice should be adopted, it would be an anomalous procedure for the court to hear the application and the showing in support of it without notice to the opposite party, and an opportunity on his part to contest the right to the new

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trial. The statute expressly declares, and this court has a number of times decided, that no such notice is required.

The reasonable interpretation of the statute, as it seems to us, is that for the purpose of the motion, and the action of the court thereon, the court retains jurisdiction of the subject-matter and of the parties, and judicial knowledge of its records during the year allowed for the making of the motion and the granting of the new trial; and that the application may be made either orally in open court, or in writing, stating such facts as will call the attention of the court to the case in which the new trial is asked.

In the case in hearing the application was in writing. It contains the title and number of the cause, and was accompanied by the required bond, which the court approved.

There is no doubt that the court, and appellees' counsel, who seem to have been present, understood perfectly in what case the application was made and new trial asked.

For the reasons stated, we think the court erred in overruling appellants' motion for a new trial. For this cause the judgment is reversed, at the costs of appellees, with instructions to the court below to sustain the motion and grant a new trial.

No. 8670.

COPELAND v. COPELAND.

CONTRACT.—Conveyance.—Condition Subsequent.—Consideration.—Agreement to Maintain Grantor and Wife.—Husband and Wife.—Divorce.—Lien.—Judgment.—Prayer of Complaint.—Performance.—A husband and wife joined in a conveyance of lands of which the husband was seized in fee, to a son of the husband by a former marriage, which the son accepted. In the deed it was declared that the land was thereby encumbered with one-half of the expenses of maintaining the grantors and each of them during the life of each, in a manner comporting with their station in life and former mode of living, and that on failure by the grantee to furnish such maintenance the land should revert to the husband. Afterwards the grantors

89	29
126	414
89	29
126	135
89	29
145	70

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were divorced. The wife sued the son, averring these facts, and that one-half the cost of her support, provided for in the deed, since the execution thereof, was \$50 per annum; that the defendant failed to furnish such support, to her damage \$250, which is due and unpaid, for which she demands judgment, etc.

Held, that the grant was subject to a condition subsequent which the husband only could enforce, and also to a lien upon the land which either could enforce against the land, but not by personal judgment against the grantee.

Held, also, that the prayer for a personal judgment did not, under the statute (R. S. 1881, sec. 385), render the complaint bad on demurrer.

Held, also, that the divorce, though granted for the fault of the wife, did not terminate her right to the maintenance provided for in the deed.

Held, also, that the facts averred were sufficient on demurrer to justify a judgment enforcing the lien.

Held, also, that an answer to the whole complaint, averring performance of the condition by the defendant until the plaintiff abandoned her husband, who obtained a divorce for such abandonment, and that he had at all times been ready to support her at her husband's home, was bad on demurrer.

From the Henry Circuit Court.

M. E. Forkner, for appellant.

J. H. Mellett and E. H. Bundy, for appellee.

HAMMOND, J.—The appellee brought this action against the appellant to recover for one-half of the value of her support and maintenance, growing out of a conveyance of real estate, on July 6th, 1875, by John Copeland and the appellee, then the grantor's wife, to the appellant and two others, who were children of said John Copeland by a former wife. A copy of the deed is filed with the appellee's complaint. In this deed separate tracts of land are conveyed to each grantee. So much of the deed, omitting descriptions of land, as relates to the appellant, is as follows:

"This indenture witnesseth, that John Copeland and Sarah Copeland, his wife, of Henry county, in the State of Indiana, convey and warrant to my children, hereinafter named, of Henry county, in the State of Indiana, for the consideration hereinafter mentioned, the several tracts of real estate herein described, respectively, in Henry county, in the State of In-

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diana, namely: *First.* To my son Needham W. Copeland, for and in consideration of natural love and affection, 47 $\frac{4}{100}$ acres," (here follows description), "which I hereby encumber with one-fourth the expenses of the full and entire maintenance of myself and wife during each of our lives; also, I convey to my son Needham W. Copeland, for and in consideration of \$1,200, which I propose to give to the children of my daughter Anna Bicknell, deceased," (here follows description of three tracts of land). "These three last described tracts I also encumber with one-fourth the expense of the full and entire maintenance of myself and wife during our lives."

* * * * *

"The maintenance referred to in this deed is to be such as comports with my station and walk in life and former mode of living, and to include all the care, necessaries and expenses in all sickness, together with the last sickness, and to pay all funeral expenses, and this to include myself and wife during each of our lives, and also care, home and home necessities and expenses during health as well as sickness. In case any one or all the above grantees failing to discharge their part or parts as above stated and respectively required, the title hereby conveyed shall revert back to me and become null and void as to the person or persons so failing. In witness whereof the grantors have hereunto set their hands and seals, this 6th day of July, 1875."

his

[Signed] "JOHN X COPELAND. [Seal.]
mark

"SARAH COPELAND. [Seal.]"

This deed was duly acknowledged and recorded.

The appellee avers in her complaint that at the time of the above conveyance John Copeland owned the land therein described; that she was then his wife, and as such joined with him in the conveyance; that the only consideration for the deed was the encumbrance placed upon the real estate therein for the support and maintenance of the grantors as therein

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provided ; that the appellant accepted the deed and entered into the possession of the real estate conveyed to him, and has since occupied and enjoyed the rents and profits thereof ; that since the execution of the deed a divorce by the Henry Circuit Court has been decreed, dissolving the marriage then existing between John Copeland and herself ; that one-half the expense of her support and maintenance as provided in the deed has been of the value of \$50 per annum, since the making of the deed ; that the appellant has wholly failed and refused to furnish her such support, to her damage in the sum of \$250, which she avers to be due and unpaid, and for which she prays judgment and other proper relief.

The appellant demurred to the complaint for want of facts to constitute a cause of action. His demurrer was overruled. He then answered, first, by the general denial ; secondly, as follows :

"Second. He says the lands described in the complaint, at the date of said conveyance, were the property in fee simple of said John Copeland, in which the plaintiff had and held only an inchoate interest as the wife of said John Copeland ; that she was his second wife, by whom he had no children ; that this defendant fully performed the conditions of said deed and kept and maintained said plaintiff as long as she remained and cohabited with said John, and has at all times performed the same as to said John Copeland, and he has been at all times ready and willing to perform the conditions of said deed and keep, maintain and support the plaintiff, such as comports with her station and walk in life and former mode of living, including all the necessaries and expenses in all sickness, together with the last sickness and funeral expenses, and to include home and home necessaries, and expenses during health as well as sickness, during her natural life, at the said home of the said John Copeland ; but on the — day of —, 1875, she, without cause, abandoned the home of her said husband, and has continued to live separate and apart from him, and on the — day of November, 1878, he recovered judgment

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against her in this court, that the bonds of matrimony theretofore existing between them be dissolved, and that he be divorced on account of said abandonment; said court at the time of the rendition of said judgment having full and complete jurisdiction of the subject-matter of the action in which said judgment was rendered, and of the parties thereto."

The appellee's demurrer, alleging want of facts to constitute a defence, was sustained to the above second paragraph of the answer. The case was tried by a jury, who returned a verdict for the appellee for \$183, and, over the appellant's motion for a new trial, a personal judgment was rendered against him on the verdict. He excepted to the rulings of the court in overruling his demurrer to the complaint, in sustaining the appellee's demurrer to the second paragraph of his answer, in overruling his motion for a new trial, and in rendering a personal judgment against him; and these several rulings he has properly assigned as error in this court. We will notice such objections as the appellant has made to these rulings and as are necessary to be referred to for a proper decision of the case. The first objection made to the complaint is that it seeks to recover a personal judgment against the appellant, which, it is claimed, is not authorized by a breach in the conditions of the deed, to support the appellee, etc.

We concur with the appellant that a personal judgment is not warranted, a point that will be again adverted to in this opinion; but still, we think, the complaint is sufficient to authorize a judgment *in rem*. In the deed set out in the appellee's complaint, one-half of her support and maintenance was made a charge upon the lands conveyed to the appellant, and the facts stated in the complaint are sufficient to enforce the lien thus created. It is true, the relief asked in the appellee's complaint is for a personal judgment, but where, as in this case, the defendant answers, the court may grant the plaintiff "any relief consistent with the case made by the complaint and embraced within the issue." Section 385, R.

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S. 1881. It is also objected to the complaint that the appellee has not chosen the proper remedy. It is insisted that there was but one remedy, namely, the right of re-entry for condition broken as provided in the deed. This right was expressly reserved by John Copeland to himself in the deed, and without such reservation he no doubt had that right during the marriage relation for the failure of the grantees to support him or the appellee according to the provisions of the deed; and we would not be understood as saying that such right does not still exist in him. But the support of the grantors, and each of them, was by the deed made an encumbrance or charge upon the land as well as a condition of the conveyance. The condition was a condition subsequent, and, if broken, the right of entry, both by the law and by the deed, was secured to John Copeland. But this was not the only remedy. The encumbrance or charge upon the land for the support of the grantors, and each of them, gave them severally a lien, by the enforcement of which in the proper action against the land, the purposes of the conveyance as to the grantors could be subserved. Both of these remedies existed in John Copeland; he could waive the right of re-entry for condition broken and enforce his lien by obtaining a decree for the sale of the land. But the right of thus enforcing her lien was the only remedy for the appellee. While the marriage relation existed, the recovery of the land and resumption of title by the husband, for a breach of the condition of the deed, would have resulted in a complete remedy for the appellee, for in such case her inchoate right of title would have re-invested in her. But since the relation of husband and wife has ceased a resumption of possession by her late husband for condition broken would be no remedy for her, and unless her lien upon the land for her support survived the dissolution of the marriage and may still be enforced by her, she is without a remedy. We believe that the lien and the remedy for its enforcement continued to exist in her. Although at the time of the conveyance she was John Copeland's second wife, and without

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children by him, and although he had living children by a former marriage, she had, notwithstanding these facts, an inchoate interest in his real estate. If she remained his wife and survived him, she would have, at least, an estate for life in one-third of all the lands of which he may have been seized during the coverture, in the conveyance of which she had not joined with him. Section 2491, R. S. 1881.

The inchoate and contingent interest of the wife in the lands of her husband is considered of so much value that few purchasers of the husband are satisfied with a conveyance unless the wife joins in it with him; indeed, this court, in two cases, *Hollowell v. Simonson*, 21 Ind. 398, and *Brown v. Rawlings*, 72 Ind. 505, has decided that the relinquishment by the wife of her inchoate interest in land of her husband is a sufficient consideration to support a conveyance of part of his land to her, which, if *bona fide*, will be upheld against the claims of her husband's creditors. The appellee was not bound to join in the conveyance to the appellant; but she did join in it for the consideration that the real estate conveyed was to be charged with a part of her support, not merely during the existence of the marriage relation but during life. The appellant accepted the conveyance with this charge upon the land. The charge thereby became her separate property or chose in action, and the subsequent divorce of her husband from her did not and could not, without her consent, affect her rights. Suppose that, in place of charging the land with her maintenance, she had, as a consideration for her joining with her husband in the deed, demanded and been promised a consideration estimated in dollars, and that for such consideration the appellant had executed and delivered to her notes payable to herself; it would not for a moment, in such case, be insisted that the subsequent divorce of herself and husband would discharge the maker from the payment of his notes. There can be no difference, in principle, as to the encumbrance that was put upon the land for her support. As a consideration for her joining in the deed, the appellant ac-

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cepted a conveyance of land encumbered for a certain part of her support during her life. If a transaction which does not concern him, but which affects only her domestic relations with her husband, may discharge the land from this encumbrance, the effect would be to release the appellant from the payment of a part of the consideration which he agreed to pay for the land. It seems to us that the mere statement of such a proposition carries with it its own refutation. It is true that a divorce deprives the wife of her inchoate interest in all lands held by her husband, but it does not work a forfeiture of the consideration received or due her for any relinquishment, previously made, of such interest.

The resumption of possession for condition broken by John Copeland since the divorce would not deprive the appellee of her right. The charge upon the land for her support during life was placed upon the land by him in making the deed as the consideration for her joining in it, and this charge must remain upon the land without reference to the ownership.

The allegation in the answer, that the appellant supported the appellee according to the provisions of the deed until she abandoned John Copeland, is bad for being incomplete. It purports to answer the whole complaint; whereas it is only a partial answer. Nor does the averment in the answer make it good, that the appellant had at all times been ready and willing to support the appellee *at the home* of John Copeland, but that she had abandoned him and he had procured a divorce from her. There was no condition in the deed that such support should be furnished her only while she lived at the home of John Copeland as his wife. This condition might have been put in the deed, but it was not. Courts can only enforce contracts as they find them, and not as parties, long after their execution, may think they ought to have been made. The cases of *Green's Adm'r v. Green*, 32 Ind. 276, *Blossom v. Ball*, 32 Ind. 115, and *Graham v. Castor*, 55 Ind. 559, cited by the appellant, are not in point, the agreements in these cases being for the support of the beneficiaries of the deed or devise, at a

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specified place, which was not the case in the deed under consideration. The appellee's charge upon the land for her support, it is proper to observe, could not be increased or in any way affected by extra expense occasioned by her abandoning her husband and living elsewhere. The encumbrance was only for such amount as would reasonably support her in the mode and condition in which she was living at the time of the execution of the deed.

We think the complaint was good, and the second paragraph of the answer bad, and that the court's rulings upon the demurrers thereto were correct.

The court, as we have seen, rendered a personal judgment against the appellant, over his objection and exception. This was error. The conditions of the deed as to the support and maintenance of the grantors imposed no personal liability upon the appellant. Such support and maintenance were made an encumbrance upon the land, without any stipulation providing for their payment outside of such encumbrance. In this respect the case at bar differs from *Burch v. Burch*, 52 Ind. 136; *Lindsey v. Lindsey*, 45 Ind. 552; *Spaulding v. Hallenbeck*, 35 N. Y. 204; and *Tanner v. VanBibber*, 2 Duv. (Ky.) 550. In these cases there was a personal liability imposed upon the devisees or grantees.

The charge made upon the appellant's land by the deed to him from John Copeland and the appellee is not unlike a mortgage where there is no agreement, in or out of it, to pay the mortgage debt. In such case the remedy is confined to the mortgaged property. *Fletcher v. Holmes*, 25 Ind. 458; sec. 1087, R. S. 1881. And the present case is also analogous to that of a grantee taking a conveyance subject to an encumbrance without an agreement to pay the same. No personal liability, in such case, follows the acceptance of the deed.

There were alleged errors set out in the appellant's motion for a new trial, involving the correctness of the court's rulings in giving and refusing certain instructions relating to the appellant's personal liability. We think there was such error

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here as entitled the appellant to a new trial; but, as these questions have been already considered, more particularity of statement respecting the same is not required. The errors complained of will not likely occur in another trial.

The judgment of the court below is reversed, and cause remanded, with instructions to sustain the appellant's motion for a new trial and for further proceedings not inconsistent with this opinion.

No. 9861.

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89	38
120	134
89	38
137	390
89	38
142	322
89	38
144	607

VENDOR AND VENDEE.—Fraud.—Contract.—Rescission.—An offer to rescind a purchase of land for fraud, made five months after the conveyance, without any reason for the delay, comes too late.

SAME.—Fraudulent Representations.—Damages.—One who is induced by fraudulent representations as to its character to purchase lands at a price above its value may recover damages without rescinding the contract.

SAME.—Complaint.—Evidence.—Variance.—A complaint by a purchaser of lands against the vendor alleged fraud, in that the defendant, for the purpose of deceiving, procured a guide to exhibit to the plaintiffs other lands, of greater value, as the lands sought to be inspected. The court found, and the evidence proved, that the plaintiffs and defendant were equally misled by the guide, without the knowledge or wish of the defendant, who merely paid the guide for his services.

Held, that this did not sustain the complaint.

SPECIAL FINDING.—Exception.—New Trial.—Practice.—An exception to conclusions of law questions only the correctness of the law as to the facts found, the facts being taken as correctly and fully found. The questions as to whether the findings are sustained by the evidence or are contrary to law are presented only by a motion for a new trial.

SAME.—Facts Not Found.—Where a special finding leaves an issue undetermined, that issue is regarded as not proved by the party having the burden of proof.

From the Hendricks Circuit Court.

J. V. Hadley, E. G. Hogate and R. B. Blake, for appellant.
C. C. Nare, for appellees.

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BICKNELL, C. C.—The appellees complained of the appellant, alleging that he owed them \$800, a balance due on a sale of land, and proposed in payment thereof to convey to them 80 acres of land in Morgan county, and, for the purpose of effecting said trade, falsely and fraudulently represented to them that said 80 acres were well set with oak trees and other valuable timber; that thereupon one of the plaintiffs went with the defendant to Morgan county to examine the land, which consisted of two 40 acre tracts; that when they reached Morgan county the defendant, with the intention and purpose aforesaid, procured one Herschel Lewis to go with them and point out and show said 40 acre tracts, and, for the purpose and with the intention aforesaid, said Lewis and defendant showed said plaintiff two 40 acre tracts well set with valuable oak and other valuable timber, and worth \$800; that said plaintiffs, relying on said statements of said defendant and said Lewis, and believing that the land so proposed to be sold was the land so pointed out, and not knowing the falsity of said statements, took said land in payment of said \$800, and received a conveyance therefor, made by one Parker and his wife, dated March 30th, 1880; that, in fact, the land so proposed to be conveyed, and which was embraced in said deed, was not the land pointed out and shown as aforesaid, and was without timber and was of very little value, all which was concealed and not known to the plaintiffs until after they had received said deed and had gone to look after their land; that they then requested the defendant to repay them said \$800, which he refused to do; that afterwards, on August 25th, 1880, said plaintiffs tendered to said Parker, in the presence of the defendants, a quitclaim deed for the land, which said Parker refused to take, and plaintiffs then again demanded of defendant said \$800, which he again refused to pay. The complaint prays that said contract as to said land be declared fraudulent and void, and that plaintiffs may have judgment for said \$800, and for all proper relief.

A demurrer to this complaint, for want of sufficient facts,

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was overruled, and this is one of the errors assigned by the appellant.

The complaint is not sufficient for a rescission of the contract, because it does not show that the offer to rescind was made in proper time. In *Krutz v. Craig*, 53 Ind. 561, this court said: "She should have disaffirmed the agreement at the earliest practicable moment after the discovery of the cheat." In *Moon v. Baum*, 58 Ind. 194, the language is: "A party seeking to set aside * an agreement for fraud in its execution, must proceed promptly upon the discovery of the fraud." To the same effect see *DeFord v. Urbain*, 48 Ind. 219, 221, and *Watson, etc., Co. v. Casteel*, 68 Ind. 476.

In *Sieveking v. Litzler*, 31 Ind. 13, a delay of two months was held fatal; here five months had elapsed after the execution of the deed before the offer to rescind. If there were any circumstances which could make such delay reasonable, they ought to have been averred in the complaint. *Hunt v. Silk*, 5 East, 449; *Campbell v. Fleming*, 1 Ad. & E. 40; *Barton v. Simmons*, 14 Ind. 49. But the complaint contains a good cause of action for damages.

The original representation was evidently not relied on, because the plaintiffs afterwards undertook to make their own examination; but notwithstanding that, if, as the complaint alleges, the defendant fraudulently procured a confederate to point out better land as the land in negotiation, and thereby induced the plaintiffs to take the proposed land in payment of their debt, they are entitled to damages, although not within the rules as to rescission, and although the original representation was not relied on. The demurrer to the complaint was rightly overruled.

Upon a general denial pleaded there was a trial by the court, with a special finding of facts and conclusions of law as follows: "The plaintiffs owned land in Hendricks county, Indiana, and in January, 1880, were anxious to sell it, and the defendant had at the time a mortgage on the same for about \$500; defendant heard that plaintiffs were desirous of sell-

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ing, and invited them to his office in Danville, where he carried on a real estate and loan broker's business. At the office defendant proposed to take the plaintiffs' land if they would accept as part payment, or as an exchange, some land owned by him in Morgan county, Indiana, which was represented to be 80 acres of timbered land, and valuable mainly for the timber upon it.

"It was agreed between the defendant and Hamilton W. Blanton, one of the plaintiffs, that they should meet near the land in Morgan county in a few days and examine it together, the defendant informing the said plaintiff that he had never seen the land himself, and did not know its exact character, though he showed said plaintiff its location on a map in his office. Some days afterwards the defendant and said plaintiff did meet near the Morgan county land and started on foot to inspect it, neither of them knowing its exact boundaries. On the way they met a stranger, who professed to be familiar with the country about the land, and said he had worked on adjoining land, that his father had once talked of buying the land then owned by defendant, and that he could point it out. The defendant paid him fifty cents to guide them to the land, and the three started to examine it. The land, as well as that about it, was broken and hilly and almost wholly unimproved, so that there were no fences or other landmarks to guide them in forming opinions as to its boundaries. On some of the land adjoining on the east and west most of the timber had been cut off, and those who had done so had, as the guide informed the men with him, endeavored to cut about to the line of defendant's land ; that he had been one of those who helped cut off the timber ; as they approached the defendant's land from the east the guide pointed out the east line, as being at or very near the line where the valuable timber had been left standing, and he further informed the men that they entered the land of the defendant on the east side and near the northeast corner ; that the land lay west and south and possibly a little north, but he was not certain of that. No exact boundaries

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were pointed out or enquired for, and the party pursued a southwesterly course through the woods and up on a high dividing ridge of land, until they came to a point which the guide said was near the southern boundary of the defendant's land. Still further to the south the land was well timbered, and there was no fence or other visible line, or supposed line, dividing the land of defendant from that toward the south. The guide, after a pause here, also showed the others about where the west line of defendant's land was, it being near by, and the stopping point being very near the southwest corner of defendant's land. This west line also the guide only fixed by the fact that timber had been cut by another owner up to a certain line readily seen by all. The party then returned to the starting point and left the land, without any explanation of boundaries from any one, and without further enquiry or search than has been already indicated. Plaintiffs and defendant in a few days exchanged lands, and the Hendricks county land was conveyed to defendant for the consideration of \$2,000, as expressed in the deed, and the defendant's Morgan county land was conveyed to plaintiffs for the expressed consideration of \$800, and defendant paid plaintiffs \$1,200 in cash as the difference between the two tracts of land, and the defendant still retains the Hendricks county land, and the plaintiffs still retain the \$1,200 in cash.

"In the following spring, about June, 1880, when plaintiffs prepared to cut the timber from the Morgan county land obtained from defendant, it was discovered that defendant had in fact owned and did in fact convey to the plaintiffs 80 acres of unimproved land in Morgan county, but the fact was found to be that the guide who had showed them the land in January had in fact taken them upon it about four rods south of the middle of the east line of defendant's land; that said land lay in a right-angled tract, twice as long as it was wide, and longest from north to south, and that all of the land shown to said Hamilton Blanton was the south half of said tract, stopping very near the south line, the route pursued having

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been crooked and through woods and brush; that the part of said tract over which he was conducted, as well as the tract adjoining it on the south, was well set with valuable timber, but the north half of said tract, which was not shown, had but little valuable timber upon it. It was cut some time before, so that nothing remained except trees of little value.

"The defendant represented to plaintiffs before selling the land, that it was timbered land, valuable for that reason principally, and also by the acts of himself and his agent, employed as a guide, induced the plaintiffs to believe that he was the owner of and was conveying to them 80 acres of well timbered land, and that the land exhibited to one of the plaintiffs was the land, and that none of it was of a different character from that exhibited, and plaintiffs did make the trade, relying upon these representations as true.

"That the defendant himself did not know the facts, or purposely mislead the plaintiffs, but that they were misled and defrauded by representations upon which they relied as herein set out.

"That the value of the 80 acres owned by defendant in Morgan county, and conveyed to plaintiffs, was and is \$300, and if the entire tract had been as represented, and as the part shown to plaintiffs, it would have been worth \$500.

"That the plaintiffs, before bringing this action, tendered to defendant a quitclaim deed to said Morgan county tract of land, and demanded instead \$800 in cash, and the defendant refused the tender."

Upon these facts the court states the following conclusions of law, to wit:

"1. Plaintiffs can not compel defendant to receive back his Morgan county land and pay them \$800 with interest.

"2. Plaintiffs had a legal right to rely upon the representations of the defendant as to the location of the land in Morgan county, and that it was all well set with valuable timber, and there was nothing in the exhibition of the land, shown as it

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was, to warn them to the contrary, or to put them upon further enquiry, and they were defrauded by said representations.

"3. That the plaintiffs were damaged by the misrepresentations of the defendant, and that the measure of their damages is the difference in value between the land as represented and as it actually was."

To these conclusions of law the defendant excepted. He also moved for a new trial for the following reason:

"The special finding of facts, as made by the court, is not sustained by sufficient evidence, and is contrary to law."

This motion was overruled, judgment was rendered for the plaintiffs for \$200 and costs, and the defendant appealed. He assigns errors as follows:

1. The court erred in its conclusions of law.
- , 2. The court erred in overruling the demurrer to the complaint.
3. The court erred in overruling the motion for a new trial.

The second of these specifications has already been considered.

Where an exception is taken to conclusions of law, the only question thereby presented is, did the court err in applying the law to the facts found? For the purpose of determining this question, the facts are taken to be correctly and fully found. *Cruzan v. Smith*, 41 Ind. 288.

The questions whether the findings are sustained by the evidence, or are contrary to law, are presented only by a motion for a new trial. *Schmitz v. Lauferty*, 29 Ind. 400.

The allegation in the complaint was that a representation was made by the defendant at Danville, that "said 80 acres were well set with oak trees and other valuable timber;" the finding is that "defendant represented to plaintiffs, before selling the land, that it was timbered land, and valuable chiefly for the timber." There is a great difference between the representation as alleged and the representation as found. Land may be timbered land, and valuable chiefly for the timber, without being well set with oak trees, or well set with any

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other timber; but this variance, perhaps, is not material, because, as we have already seen, the original representation was not relied on, and the finding shows that the plaintiffs had no right to rely upon it, because it was accompanied by the statement of the defendant, that "He had had never seen the land himself and did not know its exact character." That such a representation ought not to be relied on, see Cooley Torts, 503; *Hagee v. Grossman*, 31 Ind. 223; *Bowman v. Carithers*, 40 Ind. 90; *Port v. Williams*, 6 Ind. 219. Especially it is not to be relied on where the purchaser undertakes to examine the property for himself and has a reasonable opportunity for such examination. *Cagney v. Cuson*, 77 Ind. 494.

The only allegations in the complaint, which made it good upon the demurrer, were these: That the defendant and one of the plaintiffs went to Morgan county to look at the land, and that there the defendant, with the fraudulent intention and purpose of accomplishing the trade, procured one Herschel Lewis to go with them and show them the two 40 acre tracts, and that, for the purpose and with the intention aforesaid, said Lewis and the defendant showed said plaintiff two 40 acre tracts well set with valuable oak and other timber, and worth \$800, and that said plaintiff, relying on said statements of said defendant and said Lewis, and believing that the land so pointed out was the land to be sold, and not knowing the falsity of said statements, took said land in payment of said \$800; but, in fact, the land to be sold was without timber and of very little value, all of which was concealed, etc.

It is evident that this part of the complaint refers exclusively to what was said and done in Morgan county by the defendant and his alleged confederate, Lewis, who is stated to have been corruptly and fraudulently employed by defendant for the very purpose of deceiving said plaintiff. These allegations were the substance of the complaint. If they were not proved the plaintiffs could not succeed in their action.

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The defendant pleaded the general denial; the burden of proof was upon the plaintiffs.

The special findings of the court do not show any such fraudulent employment of Lewis for the purpose stated in the complaint. They do not show a fraudulent employment for any purpose. On the contrary, they expressly find that "the defendant did not purposely mislead the plaintiffs;" that he had "informed the plaintiffs that he had never seen the land and did not know its exact character;" that they started on foot to examine the land, "neither of them knowing its exact boundaries;" that on the way they met a stranger, not a confederate of the defendant; that the stranger professed to be able to point out the land for them, and undertook to do so for fifty cents, which the defendant paid; that the stranger took them to the land, stating that they were entering it near the northeast corner, and that the land lay west and south, and possibly a little north, but he was not certain of that; he pointed out no exact boundaries, and none were enquired for; he said they were near the southern boundary of the land, and in fact they were very near the southwest corner of it; they then returned across the land, without any statement of boundaries, and without further enquiry or search; and upon such representations of such a stranger, without any representation whatever by the defendant, who was equally ignorant with the plaintiffs, they bought the land.

The findings further show that it was afterwards discovered that the parties had entered upon the land, not near the northeast corner, but four rods south of the middle of the east line, and that the land which "the stranger, employed as a guide," undertook to show was the south half of the defendant's land, which was well set with valuable timber; while the north half of the defendant's land had but little valuable timber. The findings are continued thus: "The defendant, by the acts of himself and his agent, employed as a guide, induced the plaintiffs to believe that the land exhibited was the land to be sold,"

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etc., but the only acts of the defendant were paying the stranger fifty cents and following him to the land he pointed out. The words, "by himself and his agent, employed as a guide," do not indicate agency for any other purpose than as a guide. The substance of it is, that the parties were unable to find the land; a stranger offered to show it for fifty cents, and the defendant paid the money. Here both parties, in equal ignorance of the stranger's competency, put equal trust in him. If the defendant had produced a confederate and had represented to plaintiffs that he knew all about the land and would show it, proof of such facts would have tended to support the complaint.

The substance of the complaint, put in issue by the general denial, was that the defendant fraudulently employed his confederate, Lewis, to point out better land as the defendant's land, and that thereby the defendant deceived the plaintiffs and fraudulently induced them to buy his land. Upon this issue the special findings are silent. Where a special finding leaves an issue undetermined, that issue is regarded as not proved by the party having the burden of proof. *Graham v. State, ex rel.*, 66 Ind. 386; *Ex parte Walls*, 73 Ind. 95; *Talburt v. Berkshire L. Ins. Co.*, 80 Ind. 434; *Ayers v. Adams*, 82 Ind. 109.

The court erred in its second and third conclusions of law. The findings were contrary to the evidence and contrary to law. The judgment ought to be reversed and the cause should be remanded for a new trial.

PER CURIAM.—It is therefore ordered by the court, that the judgment of the court below be and it is hereby in all things reversed, at the costs of the appellees, and this cause is remanded for a new trial.

Opinion filed at the November term, 1882.

Petition for a rehearing overruled at the May term, 1883.

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138	47
89	48
137	142
138	614
89	48
161	515

No. 10,548.

BOARD OF COMMISSIONERS OF MADISON COUNTY v. BROWN.

BRIDGES.—*Failure to Repair.*—*Liability of County for Injury.*—*Damages.*—The liability of a county for injuries resulting from defective bridges did not cease by the taking effect of the road law of 1881, nor until road superintendents could be elected, in 1882.

SAME.—*Bridge.*—A primitive structure of logs or slabs, two feet above ground, built over a pond by road supervisors many years before the accident, was such a bridge as the county was bound to keep in repair.

SAME.—*Notice.*—*Diligence.*—The duty of the county to keep bridges in repair required active diligence to ascertain the need of repairs, so that, after defects had existed for a period of six months, the law will charge constructive notice of the need of repairs.

SAME.—*Contributory Negligence.*—A party injured by a defective bridge, who knew it was somewhat out of repair, may yet take such risks as most prudent men would take under like circumstances, without being chargeable with contributory negligence.

From the Madison Circuit Court.

W. R. Pierse and C. B. Gerard, for appellant.

H. D. Thompson and T. B. Orr, for appellee.

MORRIS, C.—The appellee presented to the appellant a claim for damages alleged to have been sustained by reason of an injury to his mare while crossing over a bridge on one of the highways of the county of Madison.

The complaint describes the highway, and alleges that fifteen years before the appellant had erected, and since partially maintained, a wooden bridge along the line of said highway, over and across a certain pond; that said bridge, when first erected, was an open bridge; that it had afterward decayed and become rotten and unsound, and, by the carelessness and neglect of the appellant, was allowed to become out of repair and unsafe and dangerous; that on the 24th day of November, 1881, the appellee drove his team, consisting of one horse and a mare attached to a wagon, along said public highway and upon said bridge, and that by reason of said bridge being out of repair, and without fault or neglect on his part, his

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said mare, while attempting to cross said bridge, thrust her foot through said bridge, which caused her to fall, and in her attempts to extricate her foot she broke and so injured the same as to render her wholly worthless; that said injury was occasioned solely by the fault and negligence of the appellant.

The board refused to allow the claim, and the appellee appealed to the circuit court. The cause was submitted to a jury for trial in the circuit court. The appellee having introduced his evidence in support of his claim, the appellant filed a demurrer to the evidence. The court overruled the demurrer, and final judgment was rendered for the appellee.

The errors assigned are as follows:

1st. The court erred in overruling the appellant's demurrer to the evidence.

2d. The court erred in rendering judgment for the appellee.

The questions presented by the record and discussed by the appellant are:

First. Was the appellant, at the time the injury to the appellee's mare happened, bound to keep the bridges upon the public highways of the county in repair and reasonably safe for travel?

Second. Was the structure upon which the appellee's animal was injured a bridge within the meaning of the law, and such an one as the board of county commissioners was bound to keep in repair?

The appellant contends that the act of 1881, in relation to the control and repair of highways, became a law on the 19th day of September, 1881, some two months before the injury complained of; that by this law the superintendence and control of highways passed from the board of county commissioners to the several township superintendents, whose election is provided for by this act; that as this act makes it the duty of these superintendents to repair highways and bridges in their respective townships, the boards of county commissioners are no longer liable for the non-repair of bridges, etc.

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Granting the proposition contended for by the appellant, it can not affect the question now presented for decision. The act should not be construed to take from the county board their control of, and power over, the public bridges of the county until the election of the township superintendents provided for. By the act of 1881, R. S. 1881, section 5064, the township superintendents were not to be elected until the first Monday in April, 1882. Until the election of such superintendents the county boards, under section 2892, R. S. 1881, then in force, had control of all bridges in the county, and it was their duty to keep the same in repair. Assuming the structure in question to be a bridge within the meaning of the law, it was, we think, the duty of the appellant to keep it in repair and reasonably safe for travel at the time the appellee's mare was injured. There was then no superintendent to take charge of the bridges in the several townships of the county, and it was the duty of the county board to do so. *House v. Board, etc.*, 60 Ind. 580 (28 Am. R. 657); *Pritchett v. Board, etc.*, 62 Ind. 210.

In the former case the court says: "The obligation thus imposed upon the board, to cause all bridges in the county to be kept in repair, with ample power to provide means to discharge the obligation, carries with it a corresponding right in every one having occasion, in the usual course of travel, to use the bridges, to have the obligation fulfilled, and the bridges kept in repair. And it seems to us to follow, that where the board negligently suffers such bridge to be out of repair, whereby a person, in the ordinary use of it, is injured in person or property, without his own fault, he must have an action against the board for damages; otherwise, there will be a wrong without a remedy."

At the time the appellee's mare was injured it was, by the express provisions of the statute, the duty of the board to keep the bridges of the county in repair, and the county still had, as before, the control of means to discharge the duty and obligation thus imposed. It follows that if the board negli-

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gently failed to discharge the duty enjoined by the statute, it is responsible to one who is thereby injured without fault on his part.

Second. Was the structure upon which the appellee's mare was injured a bridge which the appellant was bound to repair? and, if so, was it out of repair, and was the appellee's mare injured thereby without fault on his part? It is said that sec. 2892 must be construed in connection with secs. 2885, 2886 and 2887, and counsel refer us to *Driftwood, etc., Turnpike Co. v. Board, etc.*, 72 Ind. 226. The latter sections relate to advances to be made for the construction and repair of bridges, and not to the causing of repairs to be made. In the case referred to the court says: "While the commissioners must cause the bridges to be kept in repair, the expense must be borne by the road district, so far as it is able, * and the residue by the county."

The testimony tended strongly to show that the appellee's mare was injured in passing over what the witnesses all call a bridge, constructed many years ago over a pond crossed by the public highway upon which he was travelling. It also showed that this bridge or structure was, at the time the injury occurred, badly out of repair, and that it had been out of repair for several months prior to the injury. One of the witnesses describes the structure as follows: "It appears to have been built up in a kind of pen fashion. It is built up about three logs high; three stringers laid across, and slabs split and laid over them to make a bridge. I think it is now in the same place. It is about two feet from the ground, and seventy-five yards long; it was built across a button-wood pond. There is a fence on both sides of the bridge. Those who travel upon the highway must pass over the bridge or go a mile out of the way to get round it." There was testimony showing that the bridge had been built some twenty-six years before the accident occurred, by the supervisors of the road district in which it is situate. The testimony also showed that some repairs had been made upon the bridge; that there

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was considerable public travel over it, and that some time before the appellee's mare was injured the ends of the timbers of the bridge had become decayed and rotten, and that the slabs had been covered with dirt, forming a narrow passage barely sufficient for a wagon to pass over the bridge; that the appellee and others, though they knew the bridge to be somewhat unsafe, had been in the habit of passing over it with teams; that a team passed over it on the same day, and a few hours before the appellee's mare fell through it and was injured. As the appellee drove upon the bridge the dirt that had been thrown upon the slabs gave way, the mare's foot went through, and was so injured as to render her worthless.

There can be no doubt that the structure, though somewhat simple and primitive in construction, constituted a bridge within the ordinary and usual meaning of the word. Any structure of wood, stone, brick or iron, raised over a river, pond, lake or across a valley, is called a bridge. It is thus defined by Webster. See, also, American Cyclopædia, vol. 3, art. Bridge. It must be held, we think, that it was the duty of the county to cause this bridge to be kept in repair.

There is no testimony in the case even tending to show that the board of commissioners had any actual knowledge of the existence of the bridge in question, or that it was out of repair. But the testimony showed that the bridge had been out of repair for at least six months before the appellee's mare was injured, and if the board is to be charged with constructive notice, as are cities, then, upon the facts proved, it must be held to have had notice of the condition of the bridge. If it is the duty of county boards to repair, or cause to be repaired, the bridges of the county, such boards are under obligation to the public to exercise a reasonable degree of affirmative and active diligence to ascertain the condition of the public bridges of the county, and see to it that they are kept in repair and reasonably safe and fit for travel. If, as all the testimony tends to show, this bridge had been out of repair for six months prior to the injury complained of,

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the appellant could not, consistently with the exercise of reasonable diligence, have been ignorant of its condition. Under such circumstances, the appellant will be held to have had notice. *City of Indianapolis v. Scott*, 72 Ind. 196; *Rapho v. Moore*, 68 Pa St. 404 (8 Am. R. 202); 2 Dillon Mun. Corp. (3d ed.) 1024; *Dewey v. City of Detroit*, 15 Mich. 307; *Serrot v. Omaha City*, 1 Dillon, 312.

We also think that the testimony tends to show that the appellee was not guilty of contributory negligence. At the time he attempted to drive over the bridge, it was in use by the public. The appellee had been accustomed to pass over it, and thought he could safely do so at the time. Others had been passing over it and one team had gone over it safely a few hours before he attempted to do so. He, and the man who was with him, testified that he drove in a walk over the bridge. He also testified that he had stopped holes in the bridge, and always did so, before venturing upon it, when he knew there were holes in it; that he did not know that the bridge was dangerous where the mare broke through it.

From all the facts it may be fairly inferred that the appellee proceeded with due and proper care. Though he knew the passage was narrow, and, therefore, not as safe as it would have been if in proper repair, still the law allowed him to take, without fault on his part, the risk of crossing it. Shearman & Redf. on Negligence, sec. 31, says: "Nor even where the plaintiff sees that the defendant has been negligent, is he bound to anticipate all the perils to which he may *possibly* be exposed by such negligence, or to refrain absolutely from pursuing his usual course on account of risks to which he is *probably* exposed by the defendant's fault. Some risks are taken by the most prudent men; and the plaintiff is not debarred from recovery for his injury, if he has adopted the course which most prudent men would take under similar circumstances." *Turner v. Buchanan*, 82 Ind. 147 (42 Am. R. 485); *Jones v. Housatonic R. R. Co.*, 107 Mass. 261; *Morse v. Richmond*, 41 Vt. 435; *Johnson v. Beldon*, 2 Lans. (N.

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Y.) 433; *Board, etc., v. Deprez*, 87 Ind. 509. We conclude that there is no error in the record.

PER CURIAM.—The court orders, upon the above opinion, that the judgment below be affirmed, at the costs of the appellant.

No. 10,190.

NICHOL v. HENRY.

ASSIGNMENT OF ERROR.—*Names of Parties.*—It is unnecessary for a cross assignment of errors to contain the full names of the parties.

MORTGAGE.—*Foreclosure by Assignee.*—*Complaint.*—*Parties.*—*Endorsement.*—A complaint by an assignee to foreclose a mortgage, which merely avers that the mortgage was endorsed to him, without stating by whom, is not good as against a demurrer for defect of parties, because the mortgagee is not made a defendant.

SAME.—*Endorsements.*—*Exhibit.*—Where several endorsements appear upon the mortgage, but the complaint makes no reference to them, its averments can not be aided by them.

SAME.—*Allegations of Complaint Against One Claiming Title.*—The mere averment in a complaint to foreclose a mortgage against a person other than the mortgagor, that "he is now the owner of the land," is not sufficient to show that the mortgage constitutes a lien upon the land as against him, as he may have acquired the land before the mortgage was executed.

SAME.—*Record.*—*Index.*—*Constructive Notice.*—A mortgage which is spread upon the mortgage record, and duly indexed in such book, is constructive notice to a subsequent purchaser for value, though it is not entered in the entry-book or indexed in the general index.

From the Madison Circuit Court.

M. S. Robinson, J. W. Lovett and A. W. Thomas, for appellant.

E. P. Schlater, A. B. Young, J. W. Sansberry, M. A. Chipman and J. W. Sansberry, Jr., for appellee.

BEST, C.—This action was brought by the appellant against the appellee to foreclose a mortgage. The complaint averred in substance, that on the 17th day of October, 1860, George F. Chittenden executed to John H. Chittenden a mortgage

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upon the east half of lots fourteen (14) and seventeen (17), in Anderson, Madison county, Indiana, to secure the payment of \$800 on the 25th day of December, 1862, which mortgage was duly recorded in said county on said day ; "that said defendant is now the owner in fee simple of said real estate," and "that said mortgage was assigned to this plaintiff by endorsement on the back thereof before this suit began," and that the sum secured by said mortgage, with interest thereon, is due and remains wholly unpaid. Wherefore, etc.

A demurrer to the complaint for the want of facts and for defect of parties was overruled. An answer of nine paragraphs was filed. A demurrer was sustained to the fourth and fifth paragraphs and a reply in denial of the others put the case at issue. The cause was submitted to the court for trial, and, upon request, the facts were found, and the court concluded, as matter of law, that the appellant was entitled to a foreclosure for \$298. Each party excepted to the conclusion of law.

The appellant insists that the court erred in concluding that no more was due him upon the facts found.

The appellee, by a cross assignment of errors, insists that the court erred in overruling the demurrer to the complaint, in sustaining the demurrer to the fourth and fifth paragraphs of the answer, and in concluding that anything was due appellant upon the facts found.

The cross assignment of errors does not contain the full names of the parties ; and for that reason the appellant suggests that the same can not be considered. We think otherwise. The rule of this court as to an assignment of errors does not apply to a cross assignment. No process need be served, and no reason occurs to us why such assignment should contain the names of the parties. It was sufficient for the appellee to allege that errors were committed against him, and, as this was done, these alleged errors must be considered.

The demurrer to the complaint, as before stated, was for the want of facts, and for defect of parties. Among others named in the demurrer as necessary defendants was John H. Chit-

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tenden, the mortgagee. The appellee insists that it is not averred that the mortgage was transferred by endorsement by the mortgagee, and hence he was a necessary party defendant.

Our statute provides that "When any action is brought by the assignee of a claim arising out of contract, and not assigned by indorsement in writing, the assignor shall be made a defendant, to answer as to the assignment or his interest in the subject of the action." R. S. 1881, sec. 276.

This statute requires the mortgagee of any mortgage, in an action by an assignee, to be made a defendant unless such instrument has been assigned by endorsement in writing. This endorsement must be made by the mortgagee. In case such instrument is assigned by delivery, and such assignee assigns such instrument by endorsement to a second assignee, the latter must, in an action to foreclose the mortgage, make the mortgagee a defendant to answer as to his interest in the subject of the action. This must be done, though the instrument has been endorsed by an assignee. The averment is that the "mortgage was assigned to this plaintiff by endorsement." By whom endorsed is not averred. Unless it was done by the mortgagee he was a necessary party defendant, upon objection made. To avoid making him a defendant it was necessary for the appellee to allege that he had transferred the mortgage by endorsement. As this was not done it follows that the complaint was not sufficient as against the objection made, and that the court erred in overruling the demurrer. *Treadway v. Cobb*, 18 Ind. 36.

There are two or three indorsements in the transcript following the complaint, but there is no reference to them in the complaint, and its averments are in no manner aided by them. Its sufficiency must be determined without reference to them. *Stafford v. Davidson*, 47 Ind. 319; *Williams v. Osbon*, 75 Ind. 280.

It also appears to us that the simple averment, that the "defendant is now the owner of the land," is not sufficient to show

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that the mortgage constitutes a lien against him, as it does not follow from such fact that he acquired the land subsequent to the execution of the mortgage. This objection is not made, but, as the complaint must be amended for the defect already indicated, it should also be amended in this respect.

The fourth paragraph of the answer averred that the appellant purchased the land for full value, without actual knowledge of the existence of the mortgage, and that no entry was made by the recorder in the entry-book of the recorder's office.

The fifth averred that the appellant purchased the land for full value, without any actual knowledge of the existence of the mortgage, and that the same was not indexed in the general index of mortgages.

The averment in the complaint is that the mortgage was duly recorded, and as these paragraphs merely aver that the same was not noted in the general index, and was not entered in the "entry-book," it sufficiently appears that the mortgage was spread upon the mortgage record, and was indexed in the volume in which it was entered, and the question presented is whether such record is constructive notice to a subsequent purchaser. The statute in force at the time this mortgage was thus recorded provided that "Every conveyance or mortgage of land, or of any interest therein, * * shall be recorded in the recorder's office of the county where such lands shall be situated, and every conveyance or lease, not so recorded in forty-five days from the execution thereof, shall be fraudulent and void as against any subsequent purchaser, * in good faith, and for a valuable consideration." Sec. 16, 1 R.S. 1876, p. 365.

The 29th section of the same act provides that "Every recorder of deeds shall keep a book, each page of which shall be divided into five columns, headed as follows, to wit:

Date of Reception.	Names of Grantors.	Names of Grantees.	Description of Lands.	Vol. and page where recorded.
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"And the recorder shall enter in said book, all deeds and other instruments left with him to be reoorded; noting in the

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first column the day and hour of receiving such deed or instrument, and the other particulars in the appropriate column; and every such deed or instrument shall be deemed as recorded at the time so noted."

The first section of the act of February 16th, 1852, as amended, provides "That each recorder in this State is hereby authorized and required, within a reasonable time after the passage of this act, to make out, where the same has not been done, a complete or general index to all the records of deeds for real estate in his office. Such index shall be double, giving the name of each grantor and grantee alphabetically, a concise description of the premises, the date of the deed, together with the number or letter of the book, and the page in which each deed is recorded." 1 R. S. 1876, p. 757. See R. S. 1881, sec. 5938.

Section 2 of the same act provides that a like index shall be made to all the records of mortgages upon real estate in the same manner, except that the headings prescribed shall be so changed as to suit mortgages.

Section 4 of the same act as amended provides that "After the completion of such indexes, it shall be the duty of such recorder to keep up such index in the manner aforesaid, as deeds and mortgages shall from time to time be recorded, without any compensation beyond or apart from the fees allowed by law for recording such deeds or mortgages." 1 R. S. 1876, p. 758.

These are the only acts bearing upon the question under consideration, and it seems to us manifest from the mere reading of them, that the entries required to be made in the "entry book" and the general index do not constitute a part of the record of any instrument required to be recorded. The entry required to be made in the fifth column of the "entry book," to wit, "volume and page where recorded," not only indicates that this entry is not the record nor a part of it, but shows very clearly that the instrument is recorded elsewhere. Nor does the general index constitute a part of the record. Many instruments had been recorded before the law was enacted requiring such index to be made. As to them

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it constituted no part of the record, and its purpose was to enable those who desired to search the records to find such instruments as were recorded. Nor does it constitute a part of the record of such instruments as have been recorded since it was required to be made. The language of the law is that the recorder shall keep up such index, as "deeds and mortgagees shall from time to time be recorded." This language does not indicate that the index is any part of the record, but clearly implies that the record is complete without it. A record must be made before an index can be made to it, and as there is nothing in our statutes indicating that such record is not complete until the index is made or until entries in the "entry book" have been entered, we think such record will charge a subsequent purchaser with notice of the contents of such record.

In *Bishop v. Schneider*, 46 Mo. 472 (2 Am. R. 533), under statutes similar to ours, it was held that the record of a deed was constructive notice to a subsequent purchaser, though the officer failed to index it; and in *Chatham v. Bradford*, 50 Ga. 327 (15 Am. R. 692), it was held that the record of an instrument was complete without an index, though the officer was required by statute, like ours, to make one. These cases strongly support our conclusion.

The purpose, as we think, of requiring entries in an "entry book" and an index to be made, is to facilitate an examination of the records, and not to protect the interests of those whose conveyances are recorded; and in such case the failure of the officer to make the entries and to make the index, or either of them, will not prejudice the title of the grantee or mortgagee. *Cooley Torts*, p. 387, and authorities cited.

We are, therefore, of opinion that no error was committed in sustaining the demurrer to either of these paragraphs of the answer.

Several other interesting questions, arising upon the facts found, have been discussed, but as the issues must be reformed and the case retried, these questions may not again arise, and

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it is, therefore, unnecessary to consider them. For the error in overruling the demurrer to the complaint the judgment should be reversed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment be and it is hereby in all things reversed, at the appellant's costs, with instructions to sustain the demurrer to the complaint, with leave to amend.

No. 9965.

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DEFAULT.—*New Trial.*—That a party has been improperly defaulted is no cause for a new trial; and if the party defaulted afterwards plead without objection (the default having been vacated), he has no cause for any form of complaint.

WITNESSES.—*Competency.*—*Parties.*—*Decedents' Estates.*—Under the act of March 15th, 1879 (Acts 1879, p. 245; R. S. 1881, sec. 499), a plaintiff, being incompetent as a witness, could not call as a witness a defendant who had a common interest with the plaintiff, adverse to the other defendants.

SAME.—*Requirement of Court to Testify.*—*Case Overruled.*—The action of the court in overruling an objection to the competency of a witness is not equivalent to a requirement by the court that the witness shall testify. *Smith v. Smith*, 76 Ind. 236, overruled.

From the Huntington Circuit Court.

J. C. Branyan, C. W. Watkins and M. L. Spencer, for appellants.

B. M. Cobb and V. G. Smith, for appellees.

BLACK, C.—In an action commenced by John Sheets, administrator with the will annexed of Caleb Ayers, deceased, against the appellants Sarah Cupp and Allen Cupp, her husband, the court, on motion of the plaintiff and affidavit of Jonathan D. Ayers, before any appearance of the defendants, substituted Jonathan D. Ayers and Rebecca Ward as plaintiffs instead of said administrator, and made Mary Ayers and

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Agnes Ayers additional defendants. The Cupps were defaulted, but during the same term, on their motion, the default was set aside.

Jonathan D. Ayers and Rebecca Ward, by leave of court, filed an amended complaint, alleging, in substance, that Caleb Ayers died testate, August 7th, 1879, leaving as his only heirs and devisees the parties, plaintiffs and defendants, to whom by his will he devised certain real estate described, in Huntington county, of which he died seized; that when said will was made he was of sound and disposing mind; that afterward, on the 24th of July, 1879, a few days before his death, the defendant Sarah Cupp, with the assistance and connivance of her co-defendant Allen Cupp, induced said testator to execute to her a deed of conveyance of said land and caused it to be recorded. It was asked that this deed might be set aside and declared null and void, because it was procured by fraud and undue influence, in that the grantor at the time of its execution was seventy-three years old, on account of which his mind had become impaired and unsound, rendering him incompetent to contract or be contracted with; that the defendants Cupp and Cupp, well knowing his condition as aforesaid, conspired together to impose upon, wrong and defraud him; and an artifice is described at great length, by which it was alleged the appellants procured the execution of said deed.

The defendants Cupp and Cupp answered by general denial; and the defendants Mary and Agnes Ayers filed their answer, admitting the facts set out in the complaint to be true, alleging that they were interested in the subject-matter of the suit, and asking judgment for costs.

Trial by jury; verdict for the plaintiffs. The defendants Cupp and Cupp made a motion for a new trial, which was overruled. Judgment was rendered setting aside said deed, as null and void.

The overruling of the motion for a new trial is presented for our consideration.

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It was assigned as a cause for a new trial, that the court erred in defaulting the appellants on the complaint of Jonathan D. Ayers and Rebecca Ward, for want of appearance, without process having been served upon appellants to answer said complaint.

Upon the motion of the appellants that default was set aside, and they without objection appeared and answered the amended complaint. They had then no longer any reason for complaining of the taking of the default, and it could not at any time have been a good ground for a motion for a new trial.

The plaintiffs introduced as witnesses the defendants Mary and Agnes Ayers, and the court permitted them, over the objections of the appellants, to testify as to matters which occurred prior to the death of said Caleb Ayers, and these rulings were assigned as grounds for a new trial.

At the time of this trial, the following proviso of the act of March 15th, 1879, Acts 1879, p. 245, was in force:

"That in all suits by or against heirs, founded on a contract with, or demand against the ancestor, the object of which is to obtain title to or possession of land or other property of such ancestor, or to reach or affect the same in any other way, neither party shall be allowed to testify as a witness, as to any matter which occurred prior to the death of such ancestor, unless required by the opposite party or by the court trying the cause," etc.

This proviso has been construed and applied in many decisions of this court. We think these decisions and the spirit of the statute bring the case at bar within the proviso quoted. See *Wiseman v. Wiseman*, 73 Ind. 112 (38 Am. R. 115), and cases there cited.

Though these witnesses called by the plaintiffs were made defendants, they were not "opposite" parties within the meaning of the statute. Their answer, as well as the complaint, indicated that their interest was adverse to that of the appellants, and was the same as that of the plaintiffs. By the provisions of the will the land in dispute was to go to the testa-

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tor's wife for her life, and then was to be sold and the proceeds were to be divided in specified shares among the testator's children, named, the parties to this action, except Allen Cupp. The testator's wife died before the decease of the testator. All the parties to the action, except Mr. Cupp, were heirs. *Doe v. Lanius*, 3 Ind. 441; *Thompson v. Schenck*, 16 Ind. 194; *Peacock v. Albin*, 39 Ind. 25.

The appellants were interested in maintaining the deed in question. All the other parties were interested in setting aside the deed as void, for fraud upon the ancestor, so that the property might go as provided in the will. To hold that parties so interested alike in a common object might become "opposite" parties, so that they could be called by each other to testify, by some of them becoming plaintiffs and the others being made co-defendants with the really adverse parties, would be a palpable evasion of the statute. *Hunter v. Miller*, 17 Ind. 88; *Howard v. Howard*, 69 Ind. 592; *Nye v. Lowry*, 82 Ind. 316.

In *Smith v. Smith*, 76 Ind. 236, in construing the proviso of the act of 1867 in relation to the competency of parties to testify as witnesses, an executor or administrator being a party, it was said in reference to the action of the trial court in permitting an executor to testify: "The statute, 2 R. S. 1876, p. 133, sec. 2, provides, that 'where an executor * * is a party in a case, where a judgment may be rendered either for or against the estate represented by such executor, * * neither party shall be allowed to testify as a witness, unless required by the opposite party, or by the court trying the cause.' Where an objection to such testimony is overruled by the court, that is a sufficient indication of the intention of the court that the witness shall testify."

This is in conflict with the uniform ruling of the court through a long line of cases extending over many years, during which the Legislature, though from time to time amending the statute, gave no indication by its amendments that the court was construing the statute contrary to the legislative

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intention. See Acts 1861, p. 51 (2 G. & H. 168); Acts 1865, Reg. Sess., p. 58; Acts 1865, Spec. Sess., p. 160; Acts 1867, p. 225 (2 R. S. 1876, pp. 132-35); Acts 1879, p. 225. See also R. S. 1881, secs. 499, 502, and Acts 1883, p. 102.

When the court in such a case permits a party to testify over the objection of an adverse party, the court is ruling upon a question of law presented by the objection, and is upholding a supposed right. If not required to testify by the opposite party the witness must be required by the court; otherwise he can not be allowed to testify, if objection be properly made; for only by objection made and sustained or overruled can the question of the admissibility of the evidence be raised. When the court overrules such an objection, it holds that the law permits the witness to testify without being required by the opposite party or by the court. It is not the judge, but it is the court, that is to say, the law, that speaks in the ruling.

Though the order of the court to the party to testify, where it is intended to require him to testify, may be made upon a suggestion proceeding from such party, or another party not adverse to him, it is made as the act of the court exercising a judicial discretion, and not by way of adjudging a right demanded by a party as such.

So far as *Smith v. Smith, supra*, is not in agreement with these views, it should be regarded as overruled. Other causes stated in the motion for a new trial are of such a character that they may not arise on another trial, and they need not be specified.

For the error in permitting the appellees Mary and Agnes Ayers to testify as to matters which occurred prior to the death of their ancestor, the judgment should be reversed.

PER CURIAM.—It is ordered, upon the foregoing opinion, that the judgment be reversed, at the costs of the appellees.

Clouser v. Ruckman et al.

No. 10,137.

CLOUSER v. RUCKMAN ET AL.

DECEDENTS' ESTATES.—*Trial.—Jury.*—Any issue of fact concerning the settlement of the estate of a decedent was, prior to September 19th, 1881, triable by jury, at the request of either party, by the express provisions of section 188 of the act concerning decedents' estates, then in force.

From the Wells Circuit Court.

W. A. Bonham and J. K. Rinehart, for appellant.

J. S. Dailey and L. Mock, for appellees.

FRANKLIN, C.—Appellant commenced a suit to set aside an order made by the Wells Circuit Court in favor of appellees, alleging the same to be fraudulent. Appellee John M. Ruckman was the administrator of the estate of James M. Ruckman, deceased; and as such administrator, upon his petition, he procured an order from said court directing him as such administrator to surrender to himself individually a large amount of personal property belonging to said estate in payment and full discharge of two mortgages which he claimed to hold on said property. Appellant alleged in his complaint, that he was a creditor of said estate; that the estate was largely insolvent; that appellees' mortgages were fraudulent; that they were executed without any consideration, and for the purpose of defrauding decedent's creditors; that said deceased did not at the time of the execution of said mortgages have, nor has he or his estate at any time since had, sufficient other property subject to execution to pay all his debts; that appellee had full knowledge of all the facts at the times he received said mortgages, and fraudulently procured said order to be made by the court; and praying that said order be set aside, and the administrator be required to convert said property into assets for the payment of the debts of the estate. The appellee was made a party defendant both individually and as administrator. He filed a general denial as an answer.

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When the case was called for trial, appellant demanded a jury. The court refused to submit the case to a jury for trial, and appellant excepted.

There was a trial before the court, a finding for appellees, and over a motion for a new trial judgment was rendered for the appellees.

The errors assigned are that the court erred in refusing to submit the trial of the case to a jury, and overruling the motion for a new trial.

The first specification is not proper in the assignment of errors, but is a proper reason in the motion for a new trial, and as such may be considered; it being the only question presented by appellant in his brief, and appellees having filed no brief, we proceed to consider it. The trial was had September 16th, 1881.

The questions of fraud in the execution of the mortgages, and fraud in procuring the order, are questions of fact and eminently proper to be submitted for decision to a jury under the code of 1852.

The Constitution of our State provides that, "In all civil cases, the right of trial by jury shall remain inviolate." And the fact that this case is connected with the settlement of decedents' estates, makes no difference in the rule. The 188th section of the statute in relation to the settlement of decedents' estates provides that "trials by jury shall be allowed at the request of any party in all cases where there is an issue of fact."

The denial of a charge of fraud presents an issue of fact. In the case of *Shaw v. Kent*, 11 Ind. 80, it was held that a trial by jury should have been granted, and that this court will not affirm a judgment in a case in which a trial by jury was denied, on the ground that the cause was fairly tried and determined on its merits by the court. The judgment was reversed.

In the case of *Hamlyn v. Nesbit*, 37 Ind. 284, where exceptions were filed to the final report of the administrator,

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this court held that either party had a right to demand a trial by jury ; and the 188th section of the statute, *supra*, is quoted in support thereof.

In the case of *Lake Erie, etc., R. R. Co. v. Heath*, 9 Ind. 558, it was held that the Legislature could not take away the right to a trial by jury, where it is given by the Constitution.

In the case of *Reynolds v. State, ex rel.*, 61 Ind. 392, it was held that either party to a *quo warranto* proceeding was entitled as of right to demand a trial by jury ; and the refusal of a court to grant a trial by jury to a party entitled to and demanding it is a substantial error, notwithstanding the fact that, by the record, it appears that substantial justice was done. See authorities therein cited.

In the case of *Edwards v. Applegate*, 70 Ind. 325, which was an application to enjoin the sheriff from selling real estate, it was held that the parties were entitled to a jury trial.

In the case of *McMahan v. Works*, 72 Ind. 19, it was held that the clause of the Constitution providing, that in all civil cases the right of trial by jury shall remain inviolate, embraces only such cases as were treated as civil cases in this State when the Constitution was adopted, and in a proceeding supplemental to execution under section 522 of the code, where issues of fact are found, such as in ordinary cases are triable by jury, the parties should not be denied the right of such trial. The judgment was reversed.

In the case of *Phelps v. Martin*, 74 Ind. 339, it was held that, in a case of proceedings to remove an administrator, issues of fact might be formed that would entitle the parties to a trial by jury.

From the foregoing decisions we think it clear that in the case at bar the appellant was entitled to a jury trial. The question of fraud is most usually submitted to a jury, and courts are generally desirous of having it so submitted ; and when such submission is demanded by a party who is entitled to it, it is error to refuse it. The court erred in overruling

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the motion for a new trial. The judgment ought to be reversed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment of the court below be and it is in all things reversed, at appellees' costs, and that the cause be remanded, with instructions to the court below to sustain the motion for a new trial, and for further proceedings in accordance with this opinion.

No. 9946.

LAKIN ET AL. v. THE STATE, EX REL. PARKER ET AL.

BASTARDY.—*Escape.—Constable's Bond.*—A constable, negligently suffering the escape of a defendant in a bastardy prosecution, who has been committed to his custody by a justice of the peace, breaks the condition of his bond.

SAME.—*Measure of Damages.—Insolvency.*—*Prima facie*, the recovery on the bond in such case should be the amount adjudged against the defendant in bastardy on trial in the circuit court, and the insolvency of the defendant in bastardy is no mitigation.

SAME.—*Action on Constable's Bond.—Answer.*—In a suit on the constable's bond, a plea that the defendant in bastardy was not guilty is bad.

From the Hendricks Circuit Court.

J. V. Hadley, E. G. Hogate and R. B. Blake, for appellants.
N. M. Taylor, T. J. Cofer, J. W. Gordon, R. N. Lamb and S. M. Shepard, for appellees.

ELLIOTT, J.—The complaint in this case is upon a constable's bond, executed by William Lakin as principal and the other appellants as sureties. The breach alleged is that Lakin wilfully suffered the escape of one Stephen H. Newby, who had been committed to his custody by a justice of the peace on a charge of bastardy preferred by the relator.

Proceedings under the statute regulating prosecutions in bastardy cases can not be regarded as ordinary civil actions.

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They are special statutory proceedings, and are civil proceedings, but not strictly civil actions. The rules which measure the liability of officers suffering an escape of one arrested on *mesne* process, issued in civil actions, can not be applied to cases of prosecutions for bastardy. The remedy of the relator is very different from that of a plaintiff in an ordinary action, and very different liabilities attach to the defendant. The offender must pay the final judgment rendered against him, or suffer imprisonment. The custody of the law attaches to his person as soon as the judgment of the justice on the preliminary examination, is pronounced, and from that time forward he is in legal custody unless he gives the required bond. We do not think that the rules which prevail on the subject of the liability of officers in ordinary civil actions can have force in prosecutions for bastardy, and deem it unnecessary to review the cases cited by counsel.

Our statute means that a defendant in a bastardy prosecution, found guilty by the justice on a preliminary examination, shall either be kept in the custody of the law or give bond for his appearance at court. It means, too, that the constable, into whose custody the defendant is committed, shall safely keep him and make delivery to the proper sheriff. The plain duty of the constable is to use diligence and care to prevent the escape of the defendant, and if he violates this duty he is liable on his bond. It is useless to refer to old technical rules, for the bonds of constables in our State are executed to secure the performance of duties enjoined by our laws. If we find a plain statutory duty enjoined, and find that it has been violated, we need look no further; for, these things appearing, the cause of action, in favor of the party to whom the duty is owing, is complete.

It is clear, from what has been said, that the constable was guilty of a breach of duty, and that he owed this duty to the plaintiff in this cause, and, this being true, there is an undoubted right of action.

It was the duty of the constable to obey the process issued

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to him, and he is not in a position to insist that the complaint does not in terms aver that the defendant in the bastardy prosecution was guilty as charged. If it were granted that he is in a situation to do this, then it would follow that constables, and not justices, are the judges of the truth or falsity of the charge preferred against the defendant. The judgment on the preliminary examination settles this question in so far as it concerns the constable's duty, and it is not for him to review the decision of the magistrate. There can be no misconception of our statute; it provides in plain terms what the constable shall do, and he must follow the law as it is written.

There is no resemblance between a case where a magistrate upon a hearing orders a defendant into custody in accordance with express statutory provisions, and cases where the arrest is made without a hearing and upon a mere *ex parte* affidavit. Our statute intends that the accused shall not be imprisoned until he has had a hearing, but that if, upon a hearing, judgment goes against him, he shall do one of two things, go to jail or give bond. It is not part of the constable's business to challenge the correctness of the magistrate's decision ; his business is to execute the process issued to him as the law directs.

A constable, who takes a defendant into custody on a warrant issued for his arrest, is bound to use proper diligence to prevent the escape of the accused. It is the officer's duty to guard the defendant during the hearing and keep him until the order of commitment, and then to execute that order as the law commands. A constable does not discharge his duty by bringing the accused before the magistrate, and then giving no further supervision to his safe-keeping. It would hardly be contended that a sheriff could arrest a criminal, place him in the dock, and then leave him unguarded. Yet the principle which governs such a case is precisely the same as that which rules this. A constable serving a warrant is charged with the care and custody of the person arrested during the proceedings in the magistrate's court ; he is the ministerial officer,

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and must look to the safe detention of the person by him arrested. If, having the custody of the accused, he goes out with him to secure bail and then suffers him to escape, he is guilty of a breach of official duty. The duty to prevent an escape is not an intermittent one, but is a continuous one, beginning with the arrest and continuing until the commands of the law have been carried into effect.

The appellants pleaded in mitigation of damages, that Newby, the defendant in the bastardy prosecution, was wholly insolvent, and they here insist that the theory upon which the answer proceeds is the correct one. It is well settled that where there is a judgment in a prosecution for bastardy in the circuit court an officer suffering an escape can not plead the defendant's insolvency. *State, ex rel., v. Hamilton*, 33 Ind. 502; *State, ex rel., v. Mullen*, 50 Ind. 598; *Smith v. Com.*, 59 Pa. St. 320; *Karch v. Com.*, 3 Pa. St. 269; *Snyder v. Com.*, 1 Pa. 94. But in the present case there was no final judgment, until after the escape, fixing the amount of the defendant's liability, and the cases cited can not be said to be decisive of the question. We think, however, that the reasoning in these cases leads to the conclusion that where the officer wilfully suffers an escape after the preliminary hearing, he is bound to the extent of the sum fixed by the judgment on the final trial, and can not plead the defendant's insolvency in defence. In *State, ex rel., v. Hamilton, supra*, it was said: "To permit a sheriff, when he is sued for permitting the escape of a person confined in jail for a failure to pay or replevy a judgment in bastardy, to plead the insolvency of the person that he had permitted to escape, would be to deprive the unfortunate mother of such a child of a substantial remedy, provided by laws of this State for the enforcement of her judgment, and to encourage the repetition of such offences against good morals, the peace and happiness of families, and the best interests of society." This is equally true of such a case as this. It would practically nullify the provision of the statute prescribing imprisonment, if a constable were allowed to

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evade liability for a wilful disregard of duty by proof of the insolvency of the defendant in the bastardy prosecution. Imprisonment is an effective mode of compelling payment, and a constable can not justify or mitigate his wrong in wilfully suffering an escape by proof of the defendant's insolvency, since to allow him to do so would be to take from a litigant an essential part of the remedy expressly given by the law. It is not for the constable to decide whether anything could have been coerced from the defendant or his friends ; it is his business to obey the law. If the defendant were solvent there would be little need for imprisonment, because the judgment could be enforced by the ordinary legal process, but where he is insolvent, some other mode of enforcing payment is necessary ; this the statute furnishes in the form of imprisonment, and no officer who has been faithless to his duty, can be allowed to make the mode thus provided ineffectual, and then mitigate the consequences of his wrong by proof of the insolvency of the defendant. The faithless officer has no right to compel parties or courts to undertake the work of attempting to ascertain whether or not imprisonment would have forced the defendant to pay the judgment. Such an attempt would at best be little else than conjecture, for a great number of subsidiary matters must enter into the enquiry ; remote contingencies, and speculative considerations would have to be investigated and weighed, and at last no result approximating certainty be attained.

Prima facie, at least, the judgment rendered on the final trial of the bastardy prosecution is the measure of damages. The proximate result of the constable's wilful wrong is the deprivation of the means of coercing payment of the judgment to which the tribunal appointed by law to determine the matter adjudges the plaintiff entitled. No other standard can be set up without making the provision of the statute concerning imprisonment inoperative and involving the whole subject in doubt and obscurity. We do not affirm that the judgment is conclusive—we need not go that far in

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this case—but we do adjudge that where a constable wilfully suffers the defendant in a bastardy prosecution to escape, the judgment on the final trial establishes, at least *prima facie*, the guilt of the defendant, and that the sum awarded is, *prima facie*, the amount which the plaintiff in an action on the constable's bond is entitled to recover.

Judgment affirmed.

No. 10,010.

SWITZER ET AL. v. HAUK ET AL.

WILL.—Devise.—Widow.—Tenants in Common.—Parol Partition.—Agreement.—Consideration.—Estoppel.—Statute of Frauds.—Adverse Possession.—Deed.
—A testator had devised four tracts of land, one each to A., B. and C., who were required to pay \$500 to the testator for the use of the estate, and the fourth to his widow for life, with remainder to the plaintiffs; the widow renounced the will, and claimed under the law, but agreed with A., B. and C. that if they would pay the sum required she would claim no interest in the lands devised to them, but would hold the tract devised to her in fee, and at her death invest the plaintiffs with the title thereto, the plaintiffs assenting to this agreement; A., B. and C. accordingly paid the \$500, and each took and held, fenced, and made other lasting improvements on, the land devised to him, and while they were so holding the widow conveyed the undivided one-third of all of the lands to the plaintiffs, who brought suit for partition.

Held, that, while there may be a parol partition of lands between tenants in common, the facts stated do not show a partition between the widow and A., B. and C.

Held, also, that the widow was not bound by her agreement not to assert an interest, because the agreement was not in writing and was without consideration.

Held, also, that the facts do not constitute an estoppel against the widow or the plaintiffs to assert title.

Held, also, that there was no such adverse possession by A., B. and C. as to invalidate the deed of the widow to the plaintiffs.

From the Montgomery Circuit Court.

T. E. Ballard and M. E. Clodfelter, for appellants.

G. W. Paul, J. E. Humphries, J. M. Thompson, W. H. Thompson, H. M. Billings and W. Moffett, for appellees.

Switzer et al. v. Hauk et al.

Woods, C. J.—Petition by the appellants for partition. The facts alleged in the petition are, in substance, the following: Philip Hauk died testate, seized of a tract of land consisting of three pieces of 40 acres each, and a fourth piece of 77 acres; by his last will he devised the first named pieces, one to each, to Daniel Hauk, Absalom Hauk and Marion Hauk, appellees, and the fourth piece to his widow, Sarah Hauk, for life, with remainder to the appellants Margaret A. Switzer and Mary C. Comas, and the appellee Amanda L. Gray. The widow elected to take under the law, and, having thus become the owner of the undivided one-third of all the lands so devised, conveyed the same by deed to the appellants and the said Amanda L. Gray. Upon these facts the appellants claimed to be the owners each of the undivided one-ninth of the lands devised to the appellees Daniel, Absalom and Marion Hauk respectively, and asked that partition be made accordingly.

The appellee Amanda Gray made default, but afterwards filed an answer disclaiming any interest. The other appellees named answered by a denial, and by two special pleas, to which the appellants demurred, and have assigned error upon the overruling of the demurrers.

In the first of these pleas, being the second paragraph of the answer, it is alleged, in addition to the facts stated in the petition, that by the terms of the will the devisees of the three 40 acre pieces of land were required to pay to the executor the sum of \$500, to be applied in discharge of debts and legacies; that after her election to take under the law, and before the making of the conveyance to the appellants and Amanda Gray, the widow and the defendants, in 1879, mutually agreed to a partition of said lands, and by virtue of this parol agreement of partition their several lines were fixed and the fences set upon the lines agreed upon and the said Sarah and each of these defendants agreed upon the parcel of land which each should take as owner in severalty, and accordingly they each did take exclusive possession of their re-

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spective parcels so agreed upon, and caused the same to be transferred to him for taxation, and the tract devised to said Sarah for life was set off exclusively to her, and the residue in three several parcels to these three defendants, who each then took exclusive possession of his parcel, and has made lasting and valuable improvements thereon, and while each was so in the open, notorious and exclusive possession of the parcel so set off and partitioned to him, the said Sarah, without his or their knowledge or consent, and without right so to do, executed to the plaintiffs and Amanda Gray a quitclaim deed for said lands, which is the deed mentioned in the petition, and which, they claim, is void; that they paid \$500 to the executor, which he applied upon debts, legacies and to the payment of the sum allowed by law to the widow.

It may be noted here that it is not stated, in any of the pleadings, who were the heirs at law of Philip Hauk, or that he left heirs. The contrary not being averred, it is to be presumed that the defendants who joined in this plea each took, under the alleged agreement with the widow, the particular piece of land which had been devised to him. These defendants, so far as it appears, had no interest whatever in the piece of 77 acres, of which the widow is alleged to have taken possession for her part. The result of the alleged parol partition is, therefore, no partition at all, but simply an agreement or consent on the part of the widow, after electing to take under the law, to refrain from claiming an interest in the lands devised to said defendants, in consideration that they should pay to the executor the sum which, by the terms of the devise under which they held, they were already bound to pay.

This agreement to renounce her interest in land was not binding upon her, both because not in writing and because without consideration; and nothing is averred which shows an estoppel against her asserting her rights. Neither is there shown such an adverse possession by the defendants as to invalidate the conveyance made by her to the appellants and Amanda Gray. 1 Washb. Real Prop. (3d ed.) 566, 587.; 3

Switzer *et al.* v. Hauk *et al.*

Washb. Real Prop. (3d ed.) 215; *Cole v. Wright*, 70 Ind. 179; *Clouse v. Elliott*, 71 Ind. 302.

The fifth paragraph of the answer differs from the second in that it is alleged that the appellants and the appellee Gray were parties to the alleged parol partition, and that it was a part of the agreement that the widow should own and hold in fee all of the 77 acres, and at her death should invest the appellants and Gray with the title thereto, and that her deed whereby she conveyed her interest in the lands to the appellants and Gray was made in pursuance and for the purpose of accomplishing this agreement.

We do not perceive that this paragraph is any better than the second. In respect to the lands of which partition is sought, both paragraphs show that Mrs. Hauk, being a tenant in common of one piece with Daniel Hauk, of another piece with Absalom Hauk, and of the third piece with Marion Hauk, agreed with them by parol and without consideration, that she would release and renounce her interest to them each in his respective piece, and they accordingly each made improvements. As between tenants in common no such part performance is shown as to take the case out of the statute of frauds, if the agreement were otherwise binding. *Adamson v. Lamb*, 3 Blackf. 446; *Atkinson v. Jackson*, 8 Ind. 31; *Lafollett v. Kyle*, 51 Ind. 446.

We do not question that "A parol division, carried into effect by possessions taken according to it, will be sufficient to sever the possessions as between tenants in common whose titles are distinct, and when the only object of the division is to ascertain the separate possessions of each." *Jackson v. Harder*, 4 Johns. 202. *Wood v. Fleet*, 36 N. Y. 499; *Moore v. Kerr*, 46 Ind. 468. No such case is presented in this record.

The appellees who filed these special pleas also joined in a cross complaint which is obnoxious to the same objections as the pleas.

Judgment reversed and cause remanded, with instructions to sustain the demurrers to the second and fifth paragraphs

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of answer, and to the cross complaint of the appellees Hauks, with leave to amend. •

ON PETITION FOR A REHEARING.

HAMMOND, J.—In their very earnest and able brief for a rehearing, the learned counsel for the appellees assume that the appellees Daniel, Absalom and Marion Hauk are children of Philip Hauk, deceased. If this is a fact, the pleadings fail to show it. The parties may, on the return of the case to the court below, reconstruct their pleadings, and when the fact of the relationship, assumed as above stated, is properly brought to the attention of the court, a question may be presented which can not be decided in the present condition of the pleadings. The opinion of the court pronounced by the Chief Justice, on the record before us, is without doubt a correct exposition of the law.

The petition for a rehearing is overruled.

80	77
126	86
89	77
166	21

No. 9181.

THE CITY OF NORTH VERNON v. VOEGLER.

CITY.—*Negligence.—Drainage.—Surface Water.—Complaint.—Contributory Negligence.*—A municipal corporation has no right to construct a ditch in such manner as to collect surface water into a channel and pour it upon lands where it is not accustomed to run, and in a complaint for such injury it is not necessary to aver that the plaintiff was without fault.

SAME.—*Grading Streets.—Damage.—Ordinance.—Instruction.*—Where such injury is caused by grading a street, the fact that such grading was done in pursuance of an ordinance of the city in no manner exonerates the city from liability for such injury, and a request, in an action to recover damages therefor, to thus instruct the jury, was properly refused.

From the Jennings Circuit Court.

J. L. Yater and N. G. Smith, for appellant.

J. Overmyer, for appellee.

The City of North Vernon *v.* Voegler.

BEST, C.—The appellee brought this action to recover damages for injuries alleged to have been done her property by the manner in which a street near it was graded by the appellant. Issues were formed, a trial had and a verdict returned for the appellee. A motion for a new trial was overruled and judgment was rendered upon the verdict.

The appellant assigns as errors, that the complaint does not state facts sufficient to constitute a cause of action, and that the court erred in overruling the motion for a new trial. The complaint was in these words:

"Mary Voegler, plaintiff, complains of the City of North Vernon, defendant, and says that at the time of the committing of the grievances hereinafter mentioned she was the owner in fee simple of lots Nos. 12, '39 and 40 in Pabody's addition to said city; that at said date there were situate upon said lots, the property of plaintiff, a dwelling-house, barn, out-houses, hay in stack, and other personal property; that during the spring and summer of 1879, and before the bringing of this suit, the defendant caused to be graded a certain street in said city known as North O. & M. avenue; that the said lots of plaintiff do not abut upon the said North O. & M. avenue, but lie on the opposite side of the Ohio & Mississippi Railroad from the said North O. & M. avenue, and two of said lots front upon —— street, in said city; that said North O. & M. avenue was graded by the defendant in such a manner and so negligently as to throw upon and over the said lots of plaintiff a large quantity of water, falling and being upon the surface of the earth adjacent to said avenue so graded, which, before such grading was done, drained off in other directions and upon and over other lands than the lots of plaintiff; that the negligence in said grading of said street complained of consisted in this, that the defendant wholly failed to make the necessary culverts to carry off the water accumulating on said street after said grading was done, but caused said grading to be so done that the water, accumulating on said street where said grading was done, was and is all

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carried on and over the plaintiff's said premises, which was not the channel for such water before such grading was done; that so great has been the increase in the amount of water carried upon and over said lots on account of said grade, so negligently done as aforesaid, that since said grading was done, and by reason thereof, the said lots have been overflowed, the soil torn up and washed away, the hay injured by the water coming up into the stack, the house rendered almost uninhabitable by reason of the soil, manure and filth being washed thereunder and against the same, the fences injured, the ground about said house rendered sickly and unwholesome, whereby the plaintiff has been damaged in the sum of \$500. Wherefore," etc.

The first objection made to the complaint is that it does not aver that the injury was caused without the fault of the appellee. This averment is unnecessary in actions of this kind. *Roll v. City of Indianapolis*, 52 Ind. 547.

It is next insisted that municipal corporations are not liable for such injuries as are alleged in the complaint. We think otherwise. The complaint fairly charges that the appellant so graded said street as to collect in an artificial channel the surface water from the territory adjacent to said street, which did not before that time flow upon the appellee's property, and to pour the same upon her lots to their injury and to her damage. For this wrong the appellant was liable as was decided in the recently well considered case of *Weis v. City of Madison*, 75 Ind. 241 (39 Am. R. 135). This case is decisive of this question against the appellant, and we content ourselves with a reference to it.

The grounds of the motion for a new trial were, that the court erred in refusing to give instruction numbered one, and that the verdict was not supported by sufficient evidence and was contrary to law.

We have examined the evidence and think it justified the verdict of the jury. The verdict was, of course, not contrary to law.

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The instruction referred to was in these words: "If the defendant's street was graded under the provisions of an ordinance passed by the common council of said city for that purpose, and in the execution of the work and grading of said street under said ordinance, plaintiff's property was damaged as a necessary result of such grading, the plaintiff can not recover, for the reason that the grading of a street under an ordinance of the common council is a judicial act and the city is not liable for damages resulting from the execution of the work under such ordinance."

If a municipal corporation has no right to collect surface water in a channel and pour it upon the land of another, as was held in *Weis v. City of Madison, supra*, it is no justification to show that it was done by grading a street in pursuance of an ordinance passed for such purpose. If an injury results from such cause, the fact that the grading was done in pursuance of an ordinance in no manner exonerates the city from liability, as it possesses no power to thus injure the property of others. The instruction did not express the law as applicable to the case made by the complaint and by the evidence, as we think, and it was, therefore, properly refused.

This disposes of all the questions raised, and as there is no error in the record the judgment should be affirmed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment be and it is hereby in all things affirmed, at the appellant's costs.

No. 10,366.

ZELLER v. GRIFFITH, ADMINISTRATOR.

DECEDENTS' ESTATES.—Pleading.—Statute of Limitations.—Under section 2324, R. S. 1881, the defence of the statute of limitations is available to an administrator or executor without being specially pleaded.

SAME.—Claim.—Evidence.—Harmless Error.—In support of a claim against an estate for money paid on an execution against the decedent in his

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lifetime, the return on the execution, showing a payment more than six years before the filing of the claim, was offered in evidence and excluded. *Held*, that, if error, it was harmless.

NEW TRIAL.—Newly Discovered Evidence.—Diligence.—Counter Affidavits.—Counter affidavits are admissible, in an application for a new trial on account of newly discovered evidence, upon the question of diligence.

From the Montgomery Circuit Court.

M. Thompson, W. H. Thompson and J. R. Courtney, for appellant.

G. W. Paul and J. E. Humphries, for appellee.

ELLIOTT, J.—Appellant filed a claim against the estate of Patrick McGrath, deceased; the cause was tried by a jury and a verdict returned in favor of the appellee, on which judgment was entered over appellant's motion for a new trial:

Appellant offered in evidence a return to an execution issued on a judgment rendered in favor of one James B. Wilder against the decedent. The court refused to permit it to be introduced, and exception was reserved. We do not think any available error was committed in excluding this evidence. The payment on the execution was made more than seven years before the claim was filed, and, consequently, no recovery could be had for the money thus paid. The bar of the statute, as the evidence fully and plainly discloses, precluded a recovery, and the error, if error it was, in excluding the evidence could not possibly have harmed the appellant.

Under the act of 1881 the defence of the statute of limitations was available without being specially pleaded. R. S. 1881, sec. 2324; *Jennings v. McFadden*, 80 Ind. 531.

The court did not err in permitting the appellee to file an affidavit contradicting the statements of the appellant's affidavit, filed in support of his motion for a new trial, upon the ground of newly discovered evidence. It is certainly proper to file counter affidavits upon the question of diligence, and that is all this case requires us to decide. 3 Graham & Wat. New Trials, 1069; *Finch v. Green*, 16 Minn. 355.

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The affidavit of the appellee very plainly shows that the appellant did not use ordinary diligence to secure the testimony of the witness, and, as there was a lack of diligence, the court did right in denying the motion. The verdict is supported by the evidence.

Judgment affirmed.

Opinion filed at the November term, 1882.

Petition for a rehearing overruled at the May term, 1883.

No. 10,039.

JONES v. THE STATE.

CRIMINAL LAW.—Cause for New Trial—Improper Evidence.—Misconduct of Jury.—Under section 1842, R. S. 1881, where it is shown that the jury has received and considered any evidence, paper or document, not authorized by the court, such misconduct of the jury will constitute a sufficient cause for a new trial.

SAME.—Verdict.—Affidavits of Jurors.—In such a case, the affidavits of the jurors are not competent for the impeachment of their verdict; but they are admissible for the purpose of showing that they had not, in fact, been guilty of the apparent misconduct charged against them, in order to sustain their verdict.

From the Vanderburgh Circuit Court.

G. V. Menzies and M. W. Pearse, for appellant.

F. T. Hord, Attorney General, *W. H. Gudgel*, Prosecuting Attorney, and *W. B. Hord*, for the State.

Hawk, J.—At the March term, 1880, of the Posey Circuit Court, an indictment was returned charging the appellant with the murder of one James Pigg; and upon a trial there had he was found guilty as charged, and sentenced to imprisonment for life in the State's prison. Upon his appeal to this court the judgment below was reversed and the cause was remanded for a new trial. The opinion of this court, on that appeal, is reported under the title of *Jones v. State*, 71 Ind. 66.

After the reversal of the judgment and the appellant's re-

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turn, the venue of the cause was changed, upon his application, to the Vanderburgh Circuit Court. He was there tried by a jury, and a verdict was returned finding him guilty of murder in the first degree, as charged in the indictment, and assessing his punishment at imprisonment in the State's prison during his natural life. Over his motion for a new trial and his exception saved, the court rendered judgment against him on the verdict. From this judgment he has appealed to this court, and has here assigned as error the overruling of his motion for a new trial.

In their brief of this cause the appellant's learned counsel have first directed our attention to the *seventh* cause for a new trial assigned in the motion therefor, as follows: "7th. Misconduct of the jury in this, that after said jury had been charged by the court, and had retired to their room under the charge of a sworn bailiff, said jury or some member thereof, to the defendant unknown, on the 18th of December, 1881, in passing through the court-room to the jury-room, said jury having first retired on the 17th day of December, 1881, took with them into the jury-room, or caused the same to be brought to them, the said jury, a volume of the Indiana Reports of the Supreme Court, known as 71st Indiana, which said volume of reports contains the decision of the Supreme Court of the State of Indiana in the case of *Prince Jones v. The State*, which case is reported in said volume No. 71, at page 66, being the same case which said jury were called, sworn and charged to try, and that said jury kept and retained said volume of reports with them, in their said jury-room, for a long space of time, to wit, for the space of one hour; all of which will more fully appear from the affidavits of Leslie Hitch and Milton W. Pearse, herewith filed in support of this cause for a new trial."

The affidavits referred to in this cause for a new trial were made part of the record by a bill of exceptions properly in the record. They showed very clearly the truth of the matters stated in the seventh cause for a new trial, and it does

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not appear that any counter affidavits were filed on behalf of the State. The affidavit of Leslie Hitch was to the effect that he was the bailiff who had charge of the jury in this case after they retired to their room to consider of their verdict; that the jury retired, after having been charged by the court, at about half past twelve o'clock on Saturday, the 17th day of December, 1881; that on Sunday morning, December 18th, 1881, the jury were taken out of the jury-room for the purpose of getting breakfast, and, both in going out and returning, passed through the court-room; that about one hour after the jury had returned to the jury-room from breakfast, some jurymen knocked on the door, and, upon affiant's opening the door to enquire what was wanted, one of the jurors, Madison J. Bray, handed him a volume of the Indiana Reports, and that the affiant was unable to state how or at what time the jury obtained possession of such volume of reports.

Milton W. Pearse stated in substance, in his affidavit, that on Sunday morning, the 18th day of December, 1881, at about ten o'clock, he was sitting in the circuit court-room of Vanderburgh county, conversing with Leslie Hitch, who was at the time the bailiff of the court in charge of the jury in this case; that he heard a knock on the inside of the door of the jury-room where the jury were considering of their verdict; that the bailiff, Hitch, opened the door, when one of the jurors handed a book to the bailiff, who immediately delivered the book to the affiant; that the book was the 71st volume of the Indiana Reports of the decisions of the Supreme Court of Indiana, and contained at page 66 the reported decision of the Supreme Court of the case of *Prince Jones v. State of Indiana*; that the case so reported in said volume of reports, was the same case which jury had been called to try; that Prince Jones, who was the appellant in the case so reported, was the defendant in this case and upon the same charge, to wit, the murder of one James Pigg; that after the jury were charged and retired to their room on Saturday, December 17th, 1881, the volume of reports mentioned was

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lying on the table in the court-room ; that affiant had been sitting in the court-room about half an hour before the said volume of reports was handed to the bailiff, and, during that time no book had been taken into the jury-room, and that he was unable to state at what time, or in what manner, the jury obtained possession of said volume of reports.

It is earnestly insisted, on behalf of the appellant, that, upon the facts stated in these affidavits, he was and is entitled to a new trial. In section 1842, R. S. 1881, it is provided as follows: "The court shall grant a new trial to the defendant for the following causes, or any of them: * * * * * *Third.* When the jury has received and considered any evidence, paper, or document not authorized by the court. *Fourth.* When the jury has been guilty of any misconduct tending to prevent a fair and due consideration of the case."

It will be observed that the affidavits of Hitch and Pearse fail to show that the jury in this case "considered" or even read the opinion of this court on the former appeal of this cause, as reported in 71 Ind. 66. They do show, however, that, for about one hour, the jury had possession of this volume of reports containing such opinion, and ample opportunity to read and consider the same ; and it could hardly be expected that the appellant could show more than this, under the law governing the deliberations of the jury. During the time the jury were deliberating on their verdict, the law will conclusively presume, unless the contrary appears, that no one was present in the jury-room except members of the jury. The affidavits of the jurors were not competent or admissible for the purpose of impeaching their verdict, by showing misconduct on the part of such jurors, or any of them, or otherwise. *Withers v. Fiscus*, 40 Ind. 131 (13 Am. R. 283) ; *Stanley v. Sutherland*, 54 Ind. 339. While this is so, it was competent for the State, if the facts would have warranted it, to have shown by the affidavits of the jurors, for the purpose of sustaining their verdict, that they had neither taken the 71st volume of the Indiana Reports of the decisions of this court into the

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jury-room, nor procured or caused the same to brought to them, and that they had neither read nor considered the opinion of this court on the former appeal of this cause, as the same is reported in such volume. "The law is well settled, by repeated rulings of this court, that the affidavit of jurors can not be heard to impeach their verdict, but may be for the purpose of sustaining it." *Haun v. Wilson*, 28 Ind. 296.

It will be seen, from an examination of the opinion in *Jones v. State*, 71 Ind. 66, that much of the State's evidence against the appellant on the first trial of this case, is set out at length therein. Some of this evidence was held to be competent, while other evidence introduced by the State and copied in the opinion, this court decided to be incompetent, and reversed the judgment below on account of its improper admission. If, therefore, the jury trying this case, while deliberating upon their verdict, read and considered the opinion of this court on the former appeal, and the evidence, competent and incompetent, copied in such opinion, as the same is reported in 71 Ind. 66, it is very clear, we think, that in so doing the jury were guilty of such misconduct as prevented a fair consideration of the case and entitled the appellant to a new trial. Thus, in *Newkirk v. State*, 27 Ind. 1, it was shown by affidavit that after the jury retired to consult of their verdict they requested their bailiff to procure and bring to them a volume of Bishop's Criminal Law, and that the bailiff complied with their request; and it was held that the misconduct of the jury was such as to entitle the defendant to a new trial. The court said:

"This was evident misconduct, both on the part of the officer and jury. It is true that the Constitution makes the jury the judges of both the law and the facts in criminal cases, but they must receive their knowledge of both in a proper manner during the trial, and before they retire to deliberate on their verdict. The facts must be determined from the evidence given upon the trial, under the supervision of the court. Questions of law arising in the cause may be argued by coun-

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sel, and the trial is closed by the charge of the court to the jury, upon 'all matters of law which are necessary for their information in giving their verdict.' From these sources of information, they must determine the law of the case, and can not be permitted to take to their room common law authorities for the purpose of ascertaining the law. Such a practice would be inconsistent with the whole theory of correct trials by jury, and would lead to the most pernicious consequences." See, also, *Cheek v. State*, 35 Ind. 492; *Eden v. Lingenfelter*, 39 Ind. 19; *Lotz v. Briggs*, 50 Ind. 346; and *Toohy v. Sarvis*, 78 Ind. 474.

It is claimed, on behalf of the State, that the affidavits in support of this cause for a new trial were insufficient, because they did not show that the jurors, or either of them, read or considered the opinion of this court on the former appeal, as reported in 71 Ind. 66. Under the law it was not in the power of the appellant to show by competent evidence what the members of the jury did within the privacy of the jury-room; and surely the law would not require him, in a case where his life was at hazard, to show what he could not possibly show by legal evidence. But the State's attorneys say: "The circumstances all go to show that it was a scheme originating in the mind of some one evidently intended in appellant's behalf, to have some pretext, in case of conviction, on which to obtain a new trial. While the jury were absent at breakfast the book could have been placed in their room by others, and there is no evidence that any one of the jurors opened the book." The evidence, however, clearly shows that the jurors, improperly and unlawfully, had possession of the book within the jury-room for at least one hour. It was not possible for the appellant to show, by competent evidence, "that any one of the jurors opened the book." The jurors only knew whether or not any of them opened the book, and they could not be heard to impeach their verdict by their affidavits in behalf of the appellant, to the effect that they had opened the book and had read and considered the opinion of

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this court, on the former appeal, as therein reported. On the other hand, they were competent witnesses for the State to sustain their verdict; and, if the facts would have justified them in so testifying, it may well be supposed that their counter-affidavits would have been promptly filed, showing that they had never taken the book to their jury-room, and had never procured it to be taken there, and had never opened the book, nor read nor considered the opinion on the former appeal of this case, as therein reported, while such book was in their possession in the jury-room.

We are of the opinion, therefore, that the seventh cause for a new trial, above quoted, was well assigned by the appellant, and was sufficiently sustained by the affidavits therewith filed, and that for this cause the motion for a new trial ought to have been sustained.

Other questions are discussed by the appellant's counsel in their exhaustive brief of this cause, in relation to alleged errors of the court in giving and refusing to give certain instructions to the jury; but, as these supposed errors may not occur again on a new trial of this cause, we need not extend this opinion in the consideration or decision of any of the questions thereby presented.

The judgment is reversed, and the cause is remanded, with instructions to sustain the motion for a new trial, and for further proceedings not inconsistent with this opinion.

NOTE.—The clerk of this court will issue the proper notice for the return of the appellant to the sheriff of Vanderburgh county.

No. 9632.

THE CHICAGO AND INDIANAPOLIS AIR LINE RAILWAY
COMPANY v. JOHNSTON.

DEFAULT.—*Setting Aside Judgment.—Amendment of Summons.—Name.*—
Judgment by default was taken against a railway company, the summons

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and return naming it as a railroad company; at the same term the default and judgment were set aside and the plaintiff permitted to amend the summons and return by inserting the name of the defendant as a railway company and judgment then again taken on default.

Held, on appeal, that no error was committed in setting aside the default and judgment and permitting the amendment of the writ and service, the record showing that the proper representatives of the company had due notice of the action by such summons.

From the Jasper Circuit Court.

R. S. Dwiggins, for appellant.

ELLIOTT, J.—The summons issued in this case named the appellant, who was the defendant below, The Chicago and Indianapolis Air Line Railroad Company. On appellee's motion default was entered and judgment taken on the 7th day of June, 1881; on the 14th day of that month, and at the same term, the judgment and default were set aside and the appellee permitted to amend the summons and return by inserting, as the name of the defendant, The Chicago and Indianapolis Air Line Railway Company, and the defendant was again defaulted and judgment entered in appellee's favor.

We think there is no error warranting a reversal. The power of the court to set aside a default during the term is undoubted. *Burnside v. Ennis*, 43 Ind. 411; *McClellan v. Binkley*, 78 Ind. 503.

The mistake in using the word "road" instead of "way," in the writ, was one which might be cured by amendment, and no error was committed in permitting the amendment of the writ and service. The proper representatives of the appellant are affirmatively shown to have had due notice of the action, and there was, therefore, full opportunity to make defence. It would, as it seems to us, be unjust to permit the appellant to allow the action to go undefended and then secure a reversal, without taking any steps in the trial court, because of the error in giving its name in the complaint and summons.

Judgment affirmed.

HAMMOND, J., did not take part in the decision of this cause.

Price et al. v. Price et al.

No. 8766.

89	90
138	510
89	90
152	274
89	90
161	589

PRICE ET AL. v. PRICE ET AL.

WILL.—Construction.—Supreme Court.—Evidence.—Bill of Exceptions.—Complaint by an administrator with the will annexed, to have the will construed. There was a trial by the court and a finding. The terms of the will were such that parol evidence might have been admitted to aid in its construction, and it appeared by the record that evidence was heard, but there was no bill of exceptions containing it.

Held, that the Supreme Court could not review the action of the court below in refusing a new trial, nor could it consider whether or not the court had erred in construing the will.

From the Porter Circuit Court.

W. Johnson and T. J. Merrifield, for appellants.

W. E. Pinney, for appellees.

HAMMOND, J.—The appellees Eben S. Merrifield and Levi Merriman, as administrators with the will annexed of Andrew B. Price, deceased, brought this action against their co-appellees and the appellants, as the heirs and legatees of the decedent, to obtain a judicial construction of the testator's will. The case was tried by the court and a finding made construing the will, to which the appellants excepted, and their motion for a new trial being overruled, and exceptions to this ruling reserved, the court made an order directing the administrators to execute the will in accordance with its interpretation. No exception was taken to this order.

The appellants' motion for a new trial was for causes stated as follows:

- “ 1. The finding of the court is contrary to law.
- “ 2. The finding of the court is contrary to the evidence, and not sustained by sufficient evidence.”

The following errors are assigned in this court:

- “ 1. That each and every one of the several constructions placed by the court below upon the several clauses of the will in controversy is erroneous and contrary to law.

- “ 2. That the court erred in overruling the motion of appellants for a new trial.

Price et al. v. Price et al.

"3. The court erred in ordering said administrators to execute said will according to said constructions."

The evidence is not in the record. A copy of the will appears in the complaint. Parol evidence is not admissible to vary or contradict a will. *Bunnell v. Bunnell*, 73 Ind. 163. But there are cases where parol evidence will be heard to aid in the construction of a will. In *Stevenson v. Druley*, 4 Ind. 519, PERKINS, J., says: "To aid courts in interpreting wills, the law permits, in every case where it may be necessary, that parol evidence may be given of the circumstances of the testator, and of his family and affairs, in order that the court, standing, as it were, in the situation of the testator when making his will, may, with more certainty, arrive at his intention, in giving a construction to the language he may have used to express it." To the same effect, also, are *Jackson v. Hoover*, 26 Ind. 511, *Grimes' Ex'rs v. Harmon*, 35 Ind. 198 (9 Am. R. 690), and *Fraim v. Millison*, 59 Ind. 123. A latent ambiguity in a will may be explained by evidence *dehors* the will. *Grimes' Ex'rs v. Harmon*, *supra*. In the will in controversy we think probably that extrinsic evidence was admissible to aid the court in its construction; or, at least, from the will itself, we can not say that such evidence would not in any event have been proper. The record recites that "the court, having heard the evidence and arguments of counsel," etc., made the findings complained of.

The findings of the court as to the construction of the will are but conclusions of law from facts which we may presume were established by the evidence; but as the facts found by the court are not in the record we can not say that the court's conclusions are incorrect. The appellants' exceptions, therefore, to such findings or conclusions and their first assignment of error in relation thereto present no question for our decision.

Nor does the appellants' second assignment of error, that the court below erred in overruling their motion for a new trial bring before us any question. The decisions of this court are numerous, that, unless the record contains all the

The Cincinnati, Hamilton and Indianapolis Railroad Company v. Ford.

evidence, no question in this court can arise relating to the evidence, on the overruling by the court below of a motion for a new trial. Busk. Prac. 240, and cases there cited. Where the evidence is not in the record the verdict of the jury or the finding of the court is presumed to be correct.

Nor does the third assignment of error, that the court erred in ordering the administrators to execute the will according to its constructions of the same, bring before us any matter for our decision. No exception, as we have stated, was taken to this order. Besides, it is right, if the findings of the court are correct; and, in the absence of the evidence or a statement of the facts upon which such findings were predicated, they are, presumably, as they should be.

We are unable to find any error in the record. The judgment of the court below is affirmed.

No. 9850. .

THE CINCINNATI, HAMILTON AND INDIANAPOLIS RAILROAD
COMPANY v. FORD.

RAILROAD.—Killing Animals.—Fence.—Burden of Proof.—In an action against a railroad company for killing stock at a place on its track where the fence enclosing it was not securely maintained, the burden is upon it of showing reasons for its failure to properly maintain a secure fence at that place.

From the Rush Circuit Court.

R. D. Marshall and J. W. Study, for appellant.

G. C. Clark and C. Camborn, for appellee.

BLACK, C.—This was an action against the appellant to recover the value of a colt owned by the appellee, which the appellant ran its engine and train of cars against and over and killed, in Rush county, the place where the animal went upon the railroad and was killed not being securely fenced.

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Issues were formed, the trial of which resulted in a verdict in favor of the appellee for \$175. A motion for a new trial made by appellant was overruled, and this ruling is assigned as error. The grounds for a new trial stated in the motion were, that the verdict was not sustained by sufficient evidence, that it was contrary to law, and that the court erred in giving certain instructions to the jury.

The verdict was sustained by sufficient legal evidence. The plaintiff having introduced evidence tending to prove that, within six years before the commencement of the action, his colt, of the value found by the jury, wandered upon the defendant's railroad and was struck and killed by its engine and train, at a place in Rush county where the fence inclosing the railroad was not securely maintained, the burden was upon the defendant to show a sufficient reason for its failure to properly maintain a secure fence at that place. Not only did the defendant fail to show such a reason, but there was evidence of the want of it. There is nothing in the case which makes it necessary or proper to set out the evidence, all the questions involved being well settled by very many decisions of this court.

Of the instructions appellant's counsel say nothing in their brief, except that they think that charge number one, as to the evidence of the killing, is not the law, and that as to charges five and six they have no very serious objections, but they think they are a little too broad and calculated to mislead the jury. We might well decline to examine these instructions. We have, however, carefully read them and have discovered no error in them, but, as counsel have found it inconvenient or impossible to frame any argument against them, we will not discuss them.

The judgment should be affirmed.

PER CURIAM.—It is ordered, upon the foregoing opinion, that the judgment be affirmed, at appellant's costs.

Menaugh *et al.* v. Chandler *et al.*

89 94
124 191

No. 9495.

MENAUGH ET AL. v. CHANDLER ET AL.

PROMISSORY NOTE.—Principal and Surety.—Estoppel.—Where one signs a note containing a stipulation that all whose names are signed thereto agree to be held as principal debtors, he is estopped from asserting as against the obligee that he is a surety.

SAME.—Set-off.—A claim in favor of one only of several defendants can not be set off against a note executed by them in a suit by the payee thereon.

SAME.—Statute Construed.—Where one executes a note, agreeing therein that he is a principal, he can not claim a right to a set-off under the statute, R. S. 1881, section 349.

From the Carroll Circuit Court.

J. Applegate and C. R. Pollard, for appellant.

J. A. Sims, L. B. Sims, J. M. Judah and O. B. Jameson, for appellees.

ELLIOTT, J.—The appellants executed to the appellees a promissory note containing the following stipulation: “All whose names are signed to or endorsed upon this note expressly agree to be held as principal debtors.” The appellant Menaugh bought a claim against the appellees, and insists upon his right to set it off against the note.

The stipulation in the note precludes Menaugh from asserting that he is a surety. It is a general rule that a party can not contradict his own note or bond. *Miller v. Elliott*, 1 Ind. 484; *Hiatt v. Simpson*, 8 Ind. 256; *Madison, etc., Co. v. Stevens*, 10 Ind. 1. In accordance with this elementary principle it is held that one expressly agreeing to be bound as principal is estopped from asserting as against the obligee, that he is a surety. *Sprigg v. Bank*, 10 Peters, 257; *Sprigg v. Bank*, 14 Peters, 201; *Dart v. Sherwood*, 7 Wis. 446; *Waterville Bank v. Redington*, 52 Maine, 466; *Heath v. Derry Bank*, 44 N. H. 174; *Derry Bank v. Baldwin*, 41 N. H. 434.

A set-off can not exist where there is no mutuality. A claim in favor of one only of several defendants can not be

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set off against a note executed by them. *Knour v. Dick*, 14 Ind. 20; *Blankenship v. Rogers*, 10 Ind. 333; *Jones v. Diver*, 22 Ind. 184; *Griffin v. Cox*, 30 Ind. 242; *Dodge v. Dunham*, 41 Ind. 186; *Gordon v. Swift*, 46 Ind. 208; *Harris v. Rivers*, 53 Ind. 216.

Our statute creates in favor of sureties an exception to this rule; but the appellant Menaugh can not avail himself of the benefit of this exception, for the reason that he has concluded himself by his agreement to be bound as principal. One who expressly agrees that he is a principal, and undertakes as such, can not claim a right to a set-off under the statute applicable to sureties.

Judgment affirmed.

Opinion filed at the November term, 1882.

Petition for a rehearing overruled at the May term, 1883.

No. 9245.

89	95
128	207
89	95
130	493
89	95
140	605
89	95
161	651

KITTS v. WILLSON ET AL.

INJUNCTION.—Costs.—Dismissal.—A perpetual injunction, preventing the prosecution of a suit for non-payment of costs of a former suit for the same cause, which had been dismissed, is not proper.

Costs.—Stay of Proceedings for Non-Payment.—Practice.—A stay of proceedings because of non-payment of costs of a former suit for the same cause, which had been dismissed, is not a matter of right, but of sound discretion, to be exercised by the court in view of the facts of such case.

SAME.—The order should be to stay proceedings, and may be to dismiss if the costs be not paid within a time fixed, but it should only be granted where the second suit is vexatious and without merit.

SAME.—The second suit will be deemed vexatious unless the plaintiff show the contrary.

From the Ripley Circuit Court.

E. P. Ferris, W. W. Spencer and S. M. Jones, for appellant.
W. D. Willson and C. H. Willson, for appellees.

ZOLLARS, J.—The complaint in this case, asking for the

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partition of certain lands was filed in the court below on the 18th day of February, 1880. So far as it is necessary to notice the averments in this opinion, they are substantially as follows: In 1864 David Kitts, the husband of appellant, was the owner of the land described, which was of the value of \$3,000. Being indebted to James R. Cravens in the sum of about \$100, and being about to enter the United States army, upon the request of said Cravens, said Kitts and appellant, as his wife, mortgaged the said land to him by a warranty deed in form, to secure said sum. Before and at the time the deed was executed, Cravens agreed that he would reconvey the land to Kitts at any time when requested so to do, upon the payment of said indebtedness. Kitts and wife, appellant, resided upon the land, in possession of the same until the death of Kitts, in 1873, with the exception of about three years, when they were in the West. After the death of Kitts, appellant continued upon the land and in possession of it until 1875, when she was ejected by Cravens. In 1873, while appellant was in possession, Cravens conveyed the land to appellee Wm. D. Willson in consideration of \$3,000, of which sum \$2,000 remains unpaid. Wm. D. Willson afterwards, by quitclaim, conveyed to appellee Thomas E. Willson the undivided one-fourth of the land.

It is averred further, that the Willsons when they accepted the conveyances knew of the nature of the conveyance to Cravens and his agreement to reconvey to Kitts.

Appellant alleges that she is the owner of the undivided one-third of the land as the widow of Kitts, asks for a partition and a quieting of the title.

At the April term, 1880, appellees Willsons appeared and filed a sworn application to have the proceedings stayed until the costs in a former action should be paid by appellant, etc.

The statements of the application are substantially as follows: In 1874, appellant commenced an action against Wm. D. Willson and said Cravens for the identical cause of action set up in the complaint herein. While that action was pend-

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ing Cravens died and his administrator was substituted as a party defendant. On the 18th day of February, 1880, that cause was tried, and after the evidence was closed appellant voluntarily dismissed it, and judgment was rendered against her for costs, in favor of the defendants, which costs amounted to \$244. These costs have not been paid. Appellant is insolvent and has no property out of which the costs can be made. Immediately upon the dismissal of that action the present one was commenced. The application closes with a prayer that the proceedings be stayed until the said costs be paid, and that if not paid within a reasonable time appellant be perpetually enjoined from further prosecuting her action.

To this application appellant filed a sworn answer, in which she admits that the cause of action in the two cases is the same, but states that the defendants in the former action were Wm. D. Willson and said Cravens. It is stated further that in that action she recovered a judgment, from which Cravens appealed to the Supreme Court, where it was reversed upon a technical point, and not upon the merits of the case. Upon the return of the cause, in February, 1880, the administrator of Cravens was substituted, and the trial proceeded with. Upon the trial of the cause she learned for the first time that appellee Thomas E. Willson was claiming to be the owner of the one-fourth or one-half of the land, under a deed from Wm. D. Willson, which fact was unknown to her at the time of the commencement of the former action against Cravens and Wm. D. Willson. Her counsel advised her that a recovery would be doubtful on account of Thos. E. Willson claiming to be a part owner of the land, and that she had better dismiss, and commence a new action, making him a party defendant, which she did. It is stated further that she is the legal owner of the one-third of the land, and has a meritorious cause of action, which she can establish by proof; that when the Willsons purchased they knew of her legal and

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equitable rights in and to the land. It is admitted that she is poor and unable to pay the costs adjudged against her, unless she can secure her rights in a court of justice. She disclaims any malicious purpose in the prosecution of the cause, and claims to be prosecuting the same for the sole purpose of securing her rights.

The record states that the cause was submitted to the court on the application and answer, and a record of the former action, including the pleadings in the case and the record of the dismissal. The court made a final order staying proceedings until the payment of the \$244 costs adjudged against appellant upon the dismissal of her former action, and that appellant be perpetually enjoined from further prosecuting her action if said costs be not paid within six months, she having the right, in the meantime, to dismiss her action. The correctness of this order is the question presented for decision upon this appeal.

The parties defendants in the former action were the appellee herein, Wm. D. Willson, and James H. Cravens, and after his death his administrator and the children of David H. Kitts. In the present action the parties defendants are the same except that the administrator of Cravens is omitted, and Thomas E. Willson added.

This difference in parties is not such, as of itself, will prevent the application of the rule staying proceedings until the payment of the costs in the former action. *Kentish v. Tatham*, 6 Hill, 372; *Flemming v. Pennsylvania Ins. Co.*, 4 Pa. St. 475; *Sooy v. McKean*, 4 Halst. 86; *Jackson v. Carpenter*, 3 Cow. 22; *Jackson v. Edwards*, 1 Cow. 138.

The order staying proceedings until the payment of costs in a former action is not to be made in every case as a matter of right. It is a matter of sound discretion, to be exercised by the courts under the facts and circumstances of each case. *Henderson v. Griffin*, 5 Peters, 151.

The order when granted, as shown by the adjudicated cases,

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is upon the ground that the second action is without merit and vexatious. In some of the cases, want of merit and the vexatious character of the action were made to appear by the application for the order. In others these were presumed in the absence of a showing to the contrary. We think that the correct rule, as gathered from the cases, is, that the second action will be deemed vexatious until this inference shall be removed by a showing on the part of the plaintiff. This rule was adopted as controlling in the case of *State, ex rel., v. Howe*, 64 Ind. 18. See, also, *Demarest v. Wynkoop*, 2 Johns. Ch. 461; *Kerr v. Davis*, 7 Paige, 53; *Lawrence v. Dickenson*, 2 Cow. 580; *Danvers v. Morgan*, 17 C. B. 530.

In the case in hearing we think that the showing of appellant, in her answer to the application, is sufficient to remove the presumption that the prosecution on her part is vexatious or in bad faith. She swears that she is the owner of one-third of the land; that she has a meritorious cause of action which she can support by proof; that she is prosecuting the case for the sole purpose of securing her rights in the land, and with no evil purpose; and, further, that the former case was dismissed and the present one commenced under the advice of her counsel, on their statement to her that on account of claims set up by appellee Thomas E. Willson her recovery in the former action was rendered doubtful. She states further that after that action was on trial she learned for the first time of the claim thus set up, and was ignorant of it when the action was commenced.

Counsel for appellee contend that it does not appear from appellant's answer that appellee Thomas E. Willson became an owner of a portion of the land before the former action was commenced; that if he became such owner after the action was commenced it was not necessary that he should be made a defendant, and that, hence, there was no sufficient reason for the dismissal. The averment is not as specific as might be required in a pleading tendering an issue upon the

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merits of the case, but is sufficient, we think, to show that in the dismissal of the case appellant was not acting upon a frivolous pretext.

The purpose of the answer was to show simply that the prosecution of the present action is not vexatious. For this purpose it may be sufficient, although it may not have been absolutely necessary, to dismiss the former action. The spirit of our legislation would not sanction such strictness in a matter of this kind. While the courts would not tolerate a vexatious litigation, yet the largest latitude will be allowed to the poor, who are unable to pay costs, and are pursuing their rights with an honest purpose. That the costs of the former action are not paid, may be a hardship upon appellees in this case, but it is no greater than often occurs when one of the litigating parties is not good for costs.

Counsel for appellee make a stronger case in their brief than is made by the record. Our decision must be made upon the record, and not upon the briefs.

Had the case been one in which the court might and should have made an order staying proceedings until the payment of costs, yet there would have been manifest error in the order made perpetually enjoining appellant from pursuing her supposed rights in a court of justice. We know of no reason why the court might not in a proper case fix a reasonable time within which the costs should be paid; but the penalty for a failure to pay within that time should be a dismissal of the action and not a perpetual injunction. See *Kerr v. Davis*, 7 Paige, 53.

For the reasons above stated the judgment of the court below is reversed, at the costs of appellees.

B'd of Comm'rs of Tipton Co. et al. v. Ind'polis, Peru and Chicago R. W. Co.

No. 10,269.

89	101
130	17
89	101
146	313

BOARD OF COMMISSIONERS OF TIPTON COUNTY ET AL. v. INDIANAPOLIS, PERU AND CHICAGO RAILWAY COMPANY.

RAILROAD.—Tax.—Donation.—Public Aid.—Forfeiture.—Statutes Construed.—Section 18, 1 R. S. 1876, p. 740, and section 3, Acts 1872, p. 56, concerning the forfeiture of aid to the construction of railroads, apply only in cases of donation, and not where stock has been subscribed. Nor do they apply where a portion of the tax levied has been collected and paid to the railroad company.

LAW OF CASE.—The law as stated by the Supreme Court remains the law of the case, as between the parties, upon a second appeal.

From the Miami Circuit Court.

D. Waugh, H. J. Shirk and J. Mitchell, for appellants.

D. Moss and R. P. Effinger, for appellee.

HAMMOND, J.—This case was in this court before, and is reported as *Indianapolis, Peru and Chicago R. W. Co. v. Board of Commissioners of Tipton County*, 70 Ind. 385. In the reported case is found a full copy of the appellee's complaint, in which no change has since been made. The board of commissioners of Tipton county, under the act of May 12th, 1869 (1 R. S. 1876, p. 736), at its June session, 1870, on proceedings and a vote of the county previously had, appropriated \$60,000 to aid in the construction of the Lafayette, Bloomington and Muncie Railroad. To meet this appropriation, it did at the same time levy upon the taxable property of the county a special tax of \$30,000, and made a like levy at its June session of the following year. The appellee's action, commenced October 25th, 1875, in the Tipton Circuit Court and taken by change of venue to the court below, sought to enjoin the collection of this special tax against the appellee, amounting to \$1,746.67. The reported case shows that the appellee's (then the appellant's) complaint was held good on the averment that the Lafayette, Bloomington and Muncie Railroad, for whose aid the tax was levied, was not completed and ready for use within three years after the levy. This de-

B'd of Comm'r's of Tipton Co. *et al.* v. Ind'polis, Peru and Chicago R. W. Co.

cision was made under section 18 of the act of May 12th, 1869, and section 3 of an act of December 24th, 1872, Acts 1872, p. 56. Said section 18 provides, in substance, that if the railroad company for whose benefit the special tax is levied, fails to complete its railroad, ready for use, within three years after the levy, it shall forfeit all rights to the donation. Said section 3 of the last named act, having reference to the forfeiture under section 18, *supra*, provides in effect that where the railroad is not completed within three years after the levy, the taxpayers whose special tax remains uncollected shall be discharged from its payment. Both of the above sections of the statute, in a case subsequently decided but previously reported, were held to be repealed by the act of January 30th, 1873. Acts 1873, p. 184. *Wilson v. Board of Commissioners, etc.*, 68 Ind. 507. Under the law, correctly announced in this decision, the complaint in this action in the reported case should have been held insufficient. But the law as stated in the reported case must remain the law, as between the parties in this action. Buskirk's Prac. 371; *Dodge v. Gaylord*, 53 Ind. 365; *Kress v. State, ex rel.*, 65 Ind. 106; *Test v. Larsh*, 76 Ind. 452.

On the return of the case to the court below the appellants filed an answer in two paragraphs. They are of great length and substantially alike, setting out with much particularity all the proceedings in reference to the petition for, the voting and levying of, the special tax in controversy, and showing sufficient compliance with the provisions of the act of May 12th, 1869, to make such tax valid. The averments are also made that the appropriation to the L., B. & M. R. R. Co. was by subscription to its stock and not by donation; that \$50,000 of the tax was collected within three years from the levy and invested in the stock of said railroad; that the residue of the tax, except the appellee's, was uncollectible by reason of insolvency and removals; that said railroad company, within one year from the levy, expended on work on its road in Tipton county \$100,000, and fully completed its railroad

B'd of Comm'rs of Tipton Co. et al. v. Ind'polis, Peru and Chicago R. W. Co.

ready for use within five years after the levy; and that the order of the county board making the appropriation had not been cancelled. Under the facts stated in the answer, the special tax in controversy is unquestionably valid and collectible, unless the averments in the appellants' answer fail to take it from the provisions of section 18 of the act of May 12th, 1869. In our opinion the answer avoids this section, so as to make its provisions inapplicable to this case. The section provides only for forfeitures of the rights of railroad companies to receive donations, where there is a failure to complete their railroad in three years after the levy. Such a forfeiture does not apply to a case of subscription to stock, and such is the present case as shown by the answer. Nor does section 18, or the subsequent statute having reference to it, apply to a case like the present, as developed by the answer, where a part of the special tax has been collected and paid to the railroad company, so that it can not be refunded to the taxpayers who have paid it. To relieve those who have not, in such case, paid their special tax, would make taxation unequal. It would be repugnant to the policy of the Constitution and the statutes which require that the burden of taxation shall be equally distributed upon all taxable property in the same proportion. It would encourage the non-payment of taxes by giving those who had not paid an advantage over those who had.

In *State, ex rel., v. Wheadon*, 39 Ind. 520, the construction of said section 18 was involved. In that case none of the special tax had been paid. The learned judge who delivered the opinion carefully confined the decision to the case before the court, saying: "We need not, and do not, decide what would be the rule in cases where some of the taxes have been paid before the forfeiture, and others have not been paid; as in this case, none of the taxes have been paid, and there can be no inequality injuriously affecting the taxpayers."

The court below sustained a demurrer to each paragraph of the answer, to which the appellants excepted, and have

Harcourt v. Harcourt, Administrator.

properly assigned such ruling as error in this court. We think the answer was sufficient.

The judgment of the court below is reversed, and the cause remanded to the court, with instructions to overrule the demurrer to each paragraph of the appellants' answer, and for further proceedings not inconsistent with this opinion.

No. 9638.

HARCOURT v. HARCOURT, ADMINISTRATOR.

PROMISSORY NOTE.—Evidence.—Declarations.—Decedents' Estates.—In an action upon a promissory note executed by a decedent, payable out of his estate after his death, it is error to admit evidence of declarations of the decedent in reference to the note made after its execution, and in the absence of the payee.

SAME.—Consideration.—In such case evidence of a valuable consideration is necessary to support the note.

From the Marion Circuit Court.

E. Wright, A. C. Ayres and E. A. Brown, for appellant.

BICKNELL, C. C.—This was a claim against a decedent's estate upon a promissory note, of which the following is a copy:

“\$500.

JUNE 22d, 1866.

“For value received, I promise to pay to Nianetia Harcourt the sum of five hundred dollars, to be paid at my death out of my estate, without any relief from valuation or appraisement laws, without interest. JOHN HARCOURT.”

The administrator answered the claim by a general denial. On a trial by the court there was a finding for the defendant. A motion for a new trial was overruled, judgment was rendered on the finding, and the plaintiff appealed. The only error assigned is overruling the motion for a new trial. The reasons alleged for a new trial are:

1, 2 and 3. Permitting the administrator to testify against

McCormick et al. v. Webster.

the plaintiff, and to prove declarations of the decedent in reference to the note, made after the execution of the note and in the absence of the plaintiff.

4. Permitting D. B. Boardman to give in evidence statements made to him by the decedent in reference to said note, when the plaintiff was not present.

5. Finding for the defendant.

6, 7 and 8. That the finding was not sustained by sufficient evidence, and was contrary to the evidence and contrary to law.

Even if the administrator had been required to testify by the plaintiff or by the court, he was not competent to prove declarations of the decedent in reference to the note, made after its execution, and in the absence of the plaintiff. The court erred in receiving against the plaintiff the testimony of the administrator and of the witness Boardman as to such declarations of the decedent.

For these errors the judgment must be reversed. The competent evidence in the case showed very clearly that the plaintiff gave a valuable consideration for the note. See *West v. Cavins*, 74 Ind. 265, 274.

PER CURIAM.—It is therefore ordered, on the foregoing opinion, that the judgment of the court below be and it is hereby in all things reversed, at the costs of the appellee, and this cause is remanded for a new trial.

ELLIOTT, J., did not take part in the decision of this case.

30 105
128 515

No. 8941.

McCORMICK ET AL. v. WEBSTER.

JUDGMENT.—*Principal and Surety.*—*Pleading.*—Error in presenting an issue by answer, as to the question of suretyship in an action upon a note, instead of by cross complaint, does not make the judgment establishing the suretyship void; nor does the fact that such pleading was not properly signed affect the validity of the judgment.

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SAME.—*Jurisdiction.—Presumption.*—Where the record of a court of general jurisdiction is silent upon the subject, jurisdiction will be presumed.

SAME.—Where a plaintiff takes judgment, in an action upon a promissory note, on the same day that one of the defendants files an answer of suretyship, and a judgment is entered accordingly, such plaintiff can not afterwards question the jurisdiction of the court on account of want of legal service of process.

SAME.—*Notice.—Collateral Attack.*—The judgment of a court of general jurisdiction can not be collaterally attacked where there has been some service of notice, although such notice and service may be materially defective.

From the Porter Circuit Court.

H. A. Gillett, A. D. Bartholomew and J. G. Smith, for appellants.

F. Church, W. Johnston and W. Pagin, for appellee.

ELLIOTT, J.—Appellants Cyrus H. McCormick and Leander J. McCormick sued John E. Baum and the appellee on a promissory note; the latter filed an answer alleging that he was Baum's surety, and judgment was so entered and a provision embodied in it that no stay of execution should be allowed to the principal debtor unless the replevin bail would specially undertake to pay the judgment in case it could not be collected of the principal; the judgment was stayed by one Westbinder, who became insolvent and his real estate on which the lien attached passed into the hands of the appellant Powell; the judgment plaintiffs, McCormicks, issued an execution on their judgment and directed that it be levied on the property of appellee, and this action was brought by him to enjoin the enforcement of the judgment.

The appellants insist that the judgment establishing the suretyship is utterly void and may be collaterally attacked.

It is said that the question of suretyship should have been presented by cross complaint and not by answer, and that because of its having been presented by answer the judgment is void. There is no merit in this contention. Error in presenting an issue by plea instead of by cross complaint does not

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make a judgment void. There is a wide difference between an erroneous judgment and a void one.

The fact that the pleading was not properly signed does not affect the validity of the judgment.

It is contended that the court did not have jurisdiction to render such a judgment as is relied on by appellee. Where the record of a court of general jurisdiction is silent, jurisdiction is presumed, and we must, therefore, presume that the court did possess the requisite jurisdiction. *Bloomfield R. R. Co. v. Burress*, 82 Ind. 83; *Dwiggins v. Cook*, 71 Ind. 579.

The fact that judgment was rendered on the same day that the pleading was filed does not establish want of jurisdiction in a case like this, where the plaintiffs themselves take the judgment and allow it to pass unquestioned for six or seven years. It can not be justly argued that there was no jurisdiction because there could not have been legal service of process. It may have been that there was one day's service, and if so the judgment would not be void, for if there is some notice and some service the judgment can not be collaterally impeached, although the notice and service may be materially defective. *Stout v. Woods*, 79 Ind. 108; *McAlpine v. Sweetser*, 76 Ind. 78; *Hume v. Conduitt*, 76 Ind. 598; *Muncey v. Joest*, 74 Ind. 409. It may be that the principal voluntarily appeared and acknowledged the suretyship; it may be that the fact was disclosed in other pleadings; at all events, there is nothing countervailing the presumption that the court had jurisdiction to try and determine the question of suretyship.

Judgment affirmed.

Flenner *et al.* v. Benson.

No. 10,148.

89	108
134	187
195	300
89	108
139	85

FLENNER ET AL. v. BENSON.

DESCENT.—Widow.—Second Wife.—Conveyance.—Life-Estate.—Statute Construed.—Trust.—A widow without children, whose husband died leaving children of a previous marriage surviving, takes an estate in his lands in fee simple, which, under the proviso to section 2487, R. S. 1881, is held in trust, upon her death, for such children, and she can only convey an estate therein for her own life.

SAME.—Widow's Interest not Subject to Sale to Pay Husband's Debts.—The estate in fee which, upon the death of the widow, descends to such children, is not subject to sale to pay the deceased husband's debts.

From the Warren Circuit Court.

W. C. Wilson and J. H. Adams, for appellants.

J. M. Rabb and F. H. Levering, for appellee.

FRANKLIN, C.—Appellants sued appellee for the partition of certain real estate. At the request of the defendant the court made a special finding of the facts, and stated its conclusion of law. The appellants excepted to the conclusion of law, appealed to this court, and have assigned for error the conclusion of law.

Appellants are the heirs of David Flenner, who died intestate, in 1870; he left surviving him Abigail Flenner, a fourth wife, by whom he had no children; said Abigail, without marrying again, died in August, 1880.

On the 11th day of March, 1871, by order of court, the administrator of said David Flenner's estate sold the land in controversy, subject to said Abigail's interest therein, for the payment of the debts of the estate, which sale was approved by the court and a deed executed accordingly.

On the 17th day of October, 1871, said widow Abigail, in consideration of \$300, made a quitclaim deed for the land to the purchasers at the administrator's sale, they having paid at said sale for the land the sum of \$1,400. The appellee is the remote grantee of said purchasers.

The foregoing are the material facts found by the court, and upon which the court stated, as a conclusion of law, that the

Flenner *et al.* v. Benson.

plaintiffs are not entitled to recover, and that the defendant is entitled to a judgment for costs.

The question presented under this conclusion of law is as to what interest the widow had conveyed, and this question is to be settled by the proviso in the 24th section of the law of descents, 1 R. S. 1876, p. 412, and the 2487th section of the R. S. 1881, which is the same. That proviso reads: "That if a man marry a second or other subsequent wife, and has by her no children, but has children alive by a previous wife, the land which, at his death, descends to such wife, shall, at her death, descend to his children."

The 17th section of the law of descents provides that a fee simple, free from all demands of creditors, shall descend to the widow.

The 27th section provides that "A surviving wife is entitled, except as in section 17 excepted, to one-third of all the real estate of which her husband may have been seized in fee simple at any time during the marriage, and in the conveyance of which she may not have joined, in due form of law, and also of all lands in which her husband had an equitable interest at the time of his death."

Under this last named section it has been held by this court that the wife takes a fee simple interest. *Slack v. Thacker*, 84 Ind. 418; *Hendrix v. McBeth*, 87 Ind. 287. But we do not think that the 27th section governs the case under consideration; neither does the 17th section. This is not a question between the widow and the creditors of the deceased. While, under this section, the widow takes a "fee simple, free from all demands of creditors," it does not provide that she shall take a fee simple as against the heirs, or, as in this case, the children by a former marriage. But the proviso in the 24th section expressly provides that the land, which "descends to such wife, shall, at her death, descend to his children."

While, under this proviso, in such cases, the widow takes what may be termed a fee, yet she takes it in trust for the children of the husband by a former marriage, and she can

The State v. Woodward.

not convey so as to defeat their inheritance. *Louden v. James*, 31 Ind. 69; *Utterback v. Terhune*, 75 Ind. 363; *Armstrong v. Cavitt*, 78 Ind. 476.

From the foregoing, it is very evident in the case at bar that in the quitclaim deed by the widow to the purchasers of the real estate at the administrator's sale, she only conveyed an interest during her life, and at her death appellants took the fee therein, and are entitled to the partition thereof.

The court below erred in its conclusion of law, for which error the judgment ought to be reversed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment of the court below be and it is in all things reversed, at appellee's costs, and that the cause be remanded, with instruction to the court below to enter judgment on the special findings in accordance with this opinion.

Opinion filed at the November term, 1882.

Petition for a rehearing overruled at the May term, 1883.

80	110
128	508
80	110
131	436
89	110
148	28

No. 10,236.

THE STATE v. WOODWARD.*

CORPORATION.—Franchise.—Forfeiture.—A cause of forfeiture of a franchise can not be taken advantage of collaterally, or otherwise than by a direct proceeding for that purpose, and this can be brought only by the government which granted the franchise.

LOTTERIES.—Contract.—Vested Right.—Constitutional Law.—Case Overruled.—

A State may, in the exercise of its police power and in the interest of good morals, take away and abrogate a lottery privilege previously granted, without impairing the obligation of a contract within the meaning of the Constitution of the United States. *Kellum v. State*, 66 Ind. 588, overruled.

SAME.—Sale of Lottery Tickets.—Vincennes University.—Criminal Law.—The lottery privilege conferred on the Vincennes University by the Territorial Legislature in 1807 was taken away by section 8, art. 15, of the State Constitution, and the statute (R. S. 1881, section 2077,) makes the sale of lottery tickets a crime.

From the Criminal Court of Marion County.

* The opinion in this case was the last written by Hon. JAMES L. WORDEN, His first opinion appears in the 10th Ind. Rep. REPORTER.

The State *v.* Woodward.

D. P. Baldwin, Attorney General, and *J. B. Elam*, Prosecuting Attorney, for the State.

J. C. Denny, H. Burns, A. L. Roache, E. H. Lamme, M. Nye, F. W. Viehe, R. G. Evans, G. G. Reily, W. C. Johnson and W. C. Niblack, for appellee.

WORDEN, J.—This was a prosecution against the appellee, by affidavit and information, in the court below, for selling a lottery ticket in the Vincennes Lottery, Indiana, for the benefit of the Vincennes University.

The defendant pleaded as follows: "The said defendant John T. Woodward, for his special plea and answer to the affidavit and information filed herein, admits that he sold the lottery ticket, as alleged in said affidavit and information, but says that he had lawful right so to do; for that by an act of the Legislature of the Territory of Indiana, approved on the 17th day of September, 1807, there was instituted and incorporated an university in said territory, called and known by the name of the Vincennes University, and enacted that certain persons named in said act, and their successors, should be, and thereby were created, a body corporate and politic, by the name and style of 'The Board of Trustees for the Vincennes University,' and the said Legislature, among other things, provided in said act that, for certain purposes therein named, there should be raised a sum not exceeding twenty thousand dollars (\$20,000) by a lottery, and that the said board of trustees should appoint five (5) discreet persons to be managers of said lottery, and who should have power to adopt such schemes as they might deem proper to sell lottery tickets for the purpose aforesaid, to superintend the drawing of the same, and of the payment of prizes.

"And said defendant says that in pursuance of the provisions of said act the board of trustees aforesaid, for the purpose of raising the twenty thousand dollars (\$20,000) in said act mentioned, on the first day of May, 1879, appointed five discreet persons managers, as provided for in said act, for the

The State v. Woodward.

purpose of adopting and carrying on said lottery for the purpose of raising the sum aforesaid ; and the said managers, appointed as aforesaid, each and all qualified and gave bond and security as required by said act, to the approval of the board of trustees aforesaid ; and the said managers afterward adopted a certain scheme in accordance with the provisions of said act, for raising the money aforesaid, and for that purpose determined to conduct and manage a lottery under the provisions of said act. And in pursuance of said scheme, and for the purpose of raising said sum of money in said act mentioned, and for the purpose therein stated, the ticket set forth and described in the affidavit and information in this action was issued by the authority and under the direction of said managers, for sale, and was delivered to this defendant as the agent of said managers, for sale ; and the said ticket was by him sold as set forth in said affidavit and information, and was not sold by him in any other way, nor by virtue of any other power or authority whatever ; and that the lottery adopted by said managers, and in which said ticket was issued, is the first lottery had or held under said act.

"The defendant further says that the sale of said ticket was for the purpose of aiding in providing a library and the necessary philosophical and experimental apparatus agreeably to the law aforesaid ; and that no funds have been raised for said purpose, nor have the trustees of said university raised or received any funds for said purpose. Wherefore," etc.

The State demurred to this plea for want of sufficient facts, but the demurrer was overruled, and the State excepted and reserved the question of law arising thereon for the decision of this court. Reply in denial ; submission of the cause to the court for trial ; finding and judgment for the defendant. The State appeals and assigns for error the ruling on the demurrer.

The counsel for the State say in their brief: "Four questions naturally arise upon this appeal :

"*First.* Did the lottery privilege upon which the appellee relies ever have any legal inception ?

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"Second. If so, has the license been lost by failure to use it at the proper time?

"Third. If it has not been so lost, has it been within the authority of the law-making power of the State to take it away?

"Fourth. Has it been so recalled?"

We pass over the first question thus stated, as being unimportant to the decision of the main question involved, but assume that the lottery privilege had a legal inception.

We remark in reference to the second question, that the franchise can hardly have been lost by non-user, without the judgment of some competent tribunal adjudging the forfeiture. In *Angell & Ames Corp.*, 11th ed., section 777, it is said: "A cause of forfeiture can not be taken advantage of, or enforced against a corporation collaterally or incidentally, or in any other mode than by a direct proceeding for that purpose against the corporation, so that it may have an opportunity to answer. And the government creating the corporation can alone institute such a proceeding; since it may waive a broken condition of a compact made with it, as well as an individual." *Brookville, etc., T. P. Co. v. McCarty*, 8 Ind. 392.

We come to the third question. Since the case of *Kellum v. State*, 66 Ind. 588, was decided, the decision of the Supreme Court of the United States in the case of *Stone v. Mississippi*, 101 U. S. 814, has been reported, in which the same question was involved. In that case an act of the Legislature of Mississippi was passed in 1867, creating a corporation, giving it power to establish and conduct a lottery, to continue in existence twenty-five years. In 1869, a Constitution of the State was ratified, providing among other things, that "the Legislature shall never authorize any lottery, nor shall the sale of lottery tickets be allowed, nor shall any lottery heretofore authorized be permitted to be drawn, or tickets therein to be sold." Subsequent legislation was provided enforcing the provisions of the Constitution. It was held

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that the State might, in the exercise of its police power, and in the interest of public morals, take away and abrogate the lottery privilege theretofore granted, without impairing the obligation of contracts within the meaning of the Constitution of the United States. We quote the following passage from the opinion of the court in that case: "Any one, therefore, who accepts a lottery charter does so with the implied understanding that the people, in their sovereign capacity, and through their properly constituted agencies, may resume it at any time when the public good shall require, whether it be paid for or not. All that one can get by such a charter is a suspension of certain governmental rights in his favor, subject to withdrawal at will. He has in legal effect nothing more than a license to enjoy the privilege on the terms named for the specified time, unless it be sooner abrogated by the sovereign power of the State. It is a permit, good as against existing laws, but subject to future legislative and constitutional control or withdrawal."

As the Supreme Court of the United States is the ultimate tribunal for the decision of such question, the case of *Kellum v. State, supra*, must be so far modified as to harmonize with the decision of that court.

This brings us to the fourth question. It is probably true that a power to raise a given sum of money by means of a lottery implies the power to sell tickets in the lottery for that purpose. The question here is whether the board of trustees of the Vincennes University still retain the right to sell lottery tickets, or whether that right has been abrogated and annulled.

The 8th section of the 15th article of the Constitution of the State provides that "No lottery shall be authorized, nor shall the sale of lottery tickets be allowed." This provision is found in the article entitled "Miscellaneous," and not in article "Legislative." Hence no argument can be drawn from the place it occupies in the Constitution, that it was intended merely as a check upon future legislation.

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We are of opinion that the provision is not a mere check upon future legislation, but an absolute prohibition of lotteries and the sale of lottery tickets. It is so far self-executing as to take away any right or authority that might theretofore have existed to conduct lotteries or sell lottery tickets. Its evident meaning is that from the time of the adoption of the Constitution there should be no authority for conducting lotteries, nor should lottery tickets be sold. It needed legislation, to be sure, to make the conducting of lotteries or the selling of lottery tickets a crime with a prescribed punishment, but the provision effectually took away any authority that might have previously existed to do those things. See Cooley's Const. Lim., 4th ed., pp. 99 to 102, and notes; also the opinion of the court delivered by Mr. Chief Justice SHARKEY, in the case of *Brien v. Williamson*, 7 How. Miss. 14.

The necessary legislation has been supplied, and the selling of lottery tickets, or the making or drawing of "any lottery scheme or gift enterprise for the division of property, * * not authorized by law," is made a crime. R. S. 1881, sec. 2077.

If the words "not authorized by law," as thus used, imply that in the legislative mind there might be a lottery authorized by law, or that the sale of lottery tickets might be authorized by law, there is no foundation for the supposition.

The Constitution, as has been seen, took away any such authority as might have existed previous to its adoption.

The court below erred in overruling the demurrer to the defendant's plea; but the judgment can not be reversed, as by putting the defendant upon trial he was put in jeopardy, and can not be again tried for the offence. The appeal, however, is sustained, as taken upon a question reserved by the State, at the costs of the appellee. R. S. 1881, secs. 1846, 1882.

NOTE.—NIBLACK, J., did not participate in the consideration of this case.

Opinion filed at the November term, 1882.

Petition for a rehearing overruled at the May term, 1883.

Buck et al. v. Voreis.

No. 9571.

39	116
126	619
89	116
145	619

BUCK ET AL. v. VOREIS.

FRAUDULENT CONVEYANCE.—Consideration.—Where the grantor and grantee of real estate combine in a fraudulent design to defraud creditors, the conveyance will not be protected as against them, though a full consideration was paid by the grantee.

SAME.—Resulting Trust.—Property fraudulently conveyed is held by the grantee in trust for the creditors of the grantor.

SAME.—Complaint.—Mortgage.—A complaint averred that C. induced V., the plaintiff, to become surety for her on an appeal bond, representing that she was the owner of unencumbered real estate, and by executing thereon a mortgage, securing him from loss; that he was compelled to pay, as surety, a certain amount; that at the time of the execution of the mortgage the real estate was encumbered by a judgment in favor of B. & T.; that on this judgment the property was sold and bought in by them; that the sale was fraudulently made for the purpose of keeping the property out of the reach of the creditors of C.; that she retained possession of it; that there was an agreement that B. & T. should hold the property for the use of C. until she desired a reconveyance; that V. had no knowledge of the judgment until after the sheriff's sale, and that he had tendered the full amount of the judgment, interest and costs to B. & T.

Held, in an action to foreclose such mortgage and to redeem from the sale under the judgment, that the complaint was sufficient.

From the Marshall Circuit Court.

H. Corbin and J. D. McLaren, for appellants.

A. C. Capron, M. A. O. Packard and O. M. Packard, for appellee.

ELLIOTT, J.—Appellee's complaint makes this case: One Rebecca Cressner induced him to become surety for her on an appeal bond, representing to him that she was the owner of unencumbered real estate; that she executed an indemnifying mortgage on the property to secure him from loss; that he was compelled to pay as surety on the bond \$300. At the time of the execution of the mortgage the real estate here in controversy was encumbered by a judgment in favor of the appellants Buck and Toan for \$113. On this judgment a sale

Buck *et al.* v. Voreis.

was made and the property was bought in by appellants for the amount of their judgment, although it was worth \$1,500; that the sale was fraudulently made, for the purpose of keeping the property from the reach of the creditors of Rebecca Cressner; that she has retained possession of it; that there was an agreement that the appellants Buck and Toan should hold the property for the use of Rebecca Cressner until such time as she desired a reconveyance; that appellee had no knowledge of the existence of the judgment until after the sheriff's sale; that he tendered Buck and Toan the full amount of their judgment, interest and costs.

The complaint is good. A conveyance, however made, is void if the intent and purpose of the grantor and grantees is to defraud creditors. What can not be done directly can not be done by indirection. Forms are of little moment, for where fraud appears courts will drive through all matters of form and expose and punish the corrupt act. A conveyance is not protected, although full consideration is paid, where grantor and grantees unite in a fraudulent design to defraud creditors. Here, however, the consideration upon which the conveyance rests was grossly disproportioned to the value of the property.

Where property is fraudulently conveyed, the grantees holds it as trustee for the creditors of the grantor; but this is not a trust created by the contract of the parties, and appellants are in error in supposing such a trust to be within the statute. Few principles are more firmly settled than that the statute prohibiting the creation of trusts by parol has no application to resulting trusts.

Judgment affirmed.

Wales v. Miner.

No. 10,254.

WALES v. MINER.

89 118
c153 597

CRIMINAL CONVERSATION.—Seduction.—Pleading.—A complaint for criminal conversation need not allege the means by which the seduction of the wife was effected, nor that she is still the plaintiff's wife, nor that the defendant knew her to be such.

SAME.—Divorce.—That the plaintiff and his wife were divorced before the suit was begun is no defence to a suit for criminal conversation.

SAME.—Wife's Conduct.—A wife is incapable of such consent to her own seduction as will bar the husband's right of action.

SAME.—Excessive Damages.—One thousand dollars will not, by the Supreme Court, be deemed excessive damages in a suit for criminal conversation, though the wife may have been somewhat easily led astray, if the result is to induce a divorce.

SAME.—Evidence.—Statute of Limitations.—In such case, evidence of guilt more than two years before bringing the suit, the statute of limitations being pleaded, may be given without first proving guilt within two years.

SAME.—Exemplary Damages.—Instruction.—Exemplary damages may be allowed in all suits by a husband for the seduction of his wife, and though it is inaccurate to instruct the jury that this can only be done where the acts of the wrong-doer are *wilful*, the defendant can not be injured by it.

PRACTICE.—Exceptions.—Supreme Court.—Where no exception has been taken to the overruling of a demurrer to a reply, no question as to the sufficiency of the reply can be made in the Supreme Court.

SAME.—Evidence.—Error in excluding evidence is cured by the subsequent introduction of the same evidence.

From the Union Circuit Court.

B. F. Claypool, L. W. Florea and J. H. Claypool, for appellant.

J. W. Connaway and T. D. Evans, for appellee.

FRANKLIN, C.—Appellee Miner sued appellant Wales for the seduction of appellee's wife. The suit was commenced October 28th, 1881. The complaint is in two paragraphs. Appellant moved to make each paragraph of the complaint more specific, which was overruled. He then demurred to each paragraph, which was also overruled. He then filed an answer in five paragraphs. A demurrer to the fourth paragraph was sustained, and a demurrer to the second, third and fifth was overruled.

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A reply was filed in four paragraphs. A demurrer to the third and fourth paragraphs was sustained as to the third and overruled as to the fourth.

There was a trial by jury, verdict for appellee for \$1,000, and, over a motion for a new trial, judgment was rendered upon the verdict. All of which rulings against appellant have been assigned as errors.

The first paragraph of the complaint avers that "Eglantine Miner was, on the 18th day of October, 1881, the lawful wife of the plaintiff, and had been for a long time previous thereto, and was at the time hereinafter mentioned; that the defendant contriving and wrongfully and maliciously intending to injure the plaintiff, and to deprive the plaintiff of the comfort, fellowship and assistance of his said wife, Eglantine Miner, and to alienate and destroy her affections for him, the defendant, on the 1st day of January, 1872, and on every day since, until the 18th day of October, 1881, at the county of Union, and State of Indiana, wrongfully and wickedly persuaded, seduced, debauched and carnally knew the said Eglantine Miner, the then wife of plaintiff, who was his said wife at, between and upon all the time between the said 1st day of January, 1872, and the 18th day of October, 1881; and thereby did seduce her affections, the said Eglantine Miner, and alienate from him, the said plaintiff, and that thereby her affections were then and there alienated and destroyed; and, also, by means of the premises, the plaintiff from that time to the said 18th day of October, 1881, has been wholly deprived of the comfort, fellowship, society, aid and assistance of the said Eglantine Miner, his then said wife, in his domestic affairs, which during all that time he ought and would otherwise have had, to his damage \$15,000, for which sum he sues and demands judgment, and for general relief."

The second paragraph is the same, with the additional allegations, that the defendant well knew that the said Eglantine was the wife of the plaintiff, and dates the commencement of the seduction on the 1st day of January, 1874.

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The objection to these paragraphs of the complaint is that they do not state the means by which the alleged seduction was accomplished. In support thereof we have been referred to the following authorities: 1 Chitty Pl. 232; *Rees v. Cupp*, 59 Ind. 566; *Smith v. Yaryan*, 69 Ind. 445 (35 Am. R. 232); *Bell v. Rinker*, 29 Ind. 267; *Johnson v. Holliday*, 79 Ind. 151.

In the last case named no question was made upon the pleadings, and it does not apply here.

In the case in 29 Ind., *supra*, it was only held that it was not necessary to aver in the complaint the previous chastity of the plaintiff, and we can not see that that sustains appellant's views in this case.

In the case in 69th Ind., *supra*, the objection to the complaint is not stated; some of the means are set out; the complaint was held good, but it was not decided that the complaint would have been bad if the means had not been stated.

In the case in 59th Ind., *supra*, it was held that a complaint was good on demurrer without alleging the means by which the seduction was accomplished. And BIDDLE, C. J., in rendering the opinion, adds: "Perhaps it might have been made more certain on motion, but as no motion for that purpose was made, we must hold the complaint good." This is a mere doubtful dictum of the learned judge who rendered the opinion, which, if it could be made applicable where a woman brings an action for her own seduction, as in that case, can not apply where the husband brings an action for the seduction of his wife; in such a case he is not presumed to know the means used, especially as in this case, where the wife then was and still remained in the confidence of the defendant.

In 1 Chitty's Pl., p. 232, we find nothing applicable to the question. But in 2 Chitty's Pl., p. 668, we find a form and precedent of a complaint for debauching a daughter and servant, which is in accordance with the complaint in question, and which does not state any of the means used in accomplishing the seduction. Both paragraphs of the complaint allege that the defendant persuaded, seduced, debauched and

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carnally knew appellee's wife. This, we think, is a sufficient specification of facts, without alleging the proof necessary to sustain them. It is further objected, that the complaint does not show that said Eglantine was the wife of plaintiff when the suit was commenced.

The fact that a divorce may have been granted to the plaintiff a few days before the bringing of the suit would not destroy the appellee's right of action; that might be the means of perfecting it.

If the said Eglantine had died before the commencement of the suit, under section 281 of the R. S. of 1881, the action would have survived to the husband; and if she was only civilly dead as to the husband, being divorced and in a more humiliating condition to him than actual death, that would not destroy the right of action.

The action is brought for the injury and destruction of plaintiff's marital relations, and is not based upon their then existence. The complaint is not bad because it did not aver that she was his wife when the suit was commenced.

It is further objected that the first paragraph of the complaint does not aver that when the alleged seduction occurred appellant knew she was the wife of appellee. When a man engages in the practice of illicit intercourse with a woman, he is bound to take notice of her domestic relations, and he takes the hazard of being held responsible for any injuries that may result. We know of no case in which it has been held that before the action will lie the guilty party must be charged in the complaint with having, at the time of the seduction, actual notice or knowledge of the domestic relations of the seduced. The first paragraph of the complaint is not bad for not averring that at the time of the alleged seduction appellant knew that said Eglantine was the wife of the appellee.

The complaint might have been made more specific in relation to the injuries and damages, by alleging as the result of the seduction, the separation, her abandonment of the plaintiff, her suit for a divorce, and the decreeing of the di-

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vorce to appellee, thereby finally destroying the marital relations between them. But we think each paragraph stated facts sufficient, and was specific enough to withstand the motions and demurrers; there was no error in overruling them.

The next error complained of is the sustaining of the demurrer to the fourth paragraph of appellant's answer. This paragraph alleged that at the time of the commencement of the suit the said Eglantine was not the wife of the plaintiff. For the reasons heretofore given there was no error in sustaining the demurrer to this paragraph of the answer.

It is next insisted that the court erred in overruling the demurrer to the fourth paragraph of the reply. This paragraph was in reply to a paragraph in the answer pleading the statute of limitations, and averred concealment of the seduction and acts of adultery from the plaintiff until within two years prior to the bringing of the suit. The record shows that the demurrer was filed and overruled, but does not show that appellant made any objection or took any exception to the overruling of it, and no question is presented to this court on the ruling upon the demurrer; the paragraph in the reply stands the same as though no demurrer had been filed to it. But it is insisted by appellant that an objection to a reply, that it does not state facts sufficient, like the same objection to a complaint, may be raised for the first time in this court, and he has so made a specification in his assignment of errors.

Section 343 of R. S. 1881 only applies to demurrers to complaints. Appellant admits that a failure to demur or take an exception to the overruling of a demurrer to an answer waives any objection as to its sufficiency. We think the same rule applies to replies; and what can not be taken advantage of in the introduction of the testimony can not be made available in this court by an objection to the sufficiency of the allegations of the reply. If, however, the statements in the pleadings show that a party is entitled to judgment, he has his remedy by a motion for judgment on the

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pleadings, notwithstanding the verdict. This specification of errors presents no question for the consideration of this court.

The overruling of the motion for a new trial is next presented. The first four reasons call in question the sufficiency of the evidence to sustain the verdict. The evidence is long and in some respects very contradictory. We have examined it carefully, but think it unprofitable to give extracts in relation to instances of intimacy between appellant and appellee's wife. The following general facts are satisfactorily established:

Appellee and his wife were married in 1850; they lived on a farm a little distance from the town of Liberty, in said county; appellant was a single man living in the same neighborhood; in 1873 and 1874 he boarded and lodged with appellee, at his house, for several months; he then quit boarding there, but did not leave the neighborhood; in 1875 he again went to board with appellee, and remained in such capacity until about the 1st of October, 1876, when appellee became suspicious of an undue intimacy between appellant and his wife, and refused to longer board appellant; appellant then boarded a short time at a hotel in Liberty, and then went to live with his mother, within a quarter of a mile of where appellee lived; appellee's wife objected to the discharge of appellant as a boarder, and the disturbance between appellee and his wife on account of appellant continued to grow worse until in May, 1877, when she abandoned her husband; they had two sons that were grown; she went to live with one of them in a house in the neighborhood, and in a short time the son hired to work for appellant, and an arrangement was made for her to move into the house of appellant, keep the house and board appellant; they continued to live together in that way until her son got married, in the fall of 1881, when she left appellant's house and commenced a suit against appellee for a divorce; the divorce was decreed to appellee on the 19th day of October, 1881; this suit was commenced on the 28th day of October, 1881, and within a week after the suit was commenced she and appellant were married.

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The proof shows that a strong attachment had grown up between appellant and appellee's wife from the first time he went to appellee's house to board ; when he was not boarding there his frequent visits to appellee's house, when appellee's wife was alone, and the many instances of improper conduct between them when they were frequently together, absent from appellee's house, as testified to by appellee's witnesses, if believed by the jury, were amply sufficient to justify the jury in coming to the conclusion that she had been seduced by appellant, and that they were guilty of continuous adultery on various occasions, from the year 1873 until Christmas, in 1879. No acts of improper conduct, other than their so living in the same house together, were proved to have taken place from December 25th, 1879, until the divorce was granted ; but from their manner of dwelling, and the intimacy that existed between them, it is fair to presume that they continued their former customs of life.

It is further insisted that all the right of action in the plaintiff, which the evidence tends to prove, is barred by the statute of limitations. The act proved, of December, 1879, was not within the statute of limitations, and the evidence shows that prior to two years immediately preceding the commencement of this action, while appellee, after July, 1876, had his suspicions of the guilt of his wife and appellant, on account of their general intimacy, he knew no facts upon which to act until within two years before the bringing of this suit. These acts, so far as convenient, would naturally be kept by appellant from the knowledge of appellee, and the proof shows that upon one occasion he requested the witness not to tell that he had met appellee's wife at Centreville on the occasion of the county fair there.

We think the evidence does not show that the action was barred by the statute of limitations, and that it does tend strongly to sustain the verdict of the jury.

In connection with the evidence, it is further claimed as a reason for a new trial, that the damages are excessive, be-

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cause appellant may have been seduced by the wife, and not the wife by appellant.

The wife may not have been without fault; and while her contributions to guilt, if any, might perhaps be considered in mitigation of damages, though this we do not decide, they could not relieve the appellant from liability. As against the rights of the husband, the wife is incapable of consenting to her seduction. But observation has demonstrated that absolute perfection in men and total depravity in women are not the general rule, and we can not presume, in the absence of proof, that the wife alone was guilty, and appellant innocent. We see nothing in the evidence in this case to justify the conclusion that the wife seduced appellant. And when we take into consideration the general circumstances surrounding this case, that appellee, in his advanced years has been deprived of the society, affections and assistance of his wife, his name dishonored and his family disgraced, his mental anguish, pain and vexation, his peaceful home broken up, and all his marital relations overthrown by the destroyer of his wife's virtue, we think that a very low estimate or limit should not be placed upon the amount of damages that should be awarded by a jury in such a case.

We see nothing in the evidence to justify a disturbance of the verdict of the jury or the judgment of the court, on account of excessive damages.

It is further claimed, as a reason for a new trial, that the court erred in permitting the plaintiff to prove acts tending to show adultery between his wife and appellant that occurred more than two years before the bringing of the suit, without having first proved some such act within the two years.

Under the direction of the court, the plaintiff had the right to control the order of his testimony. And whether he failed to establish by a preponderance of the evidence, that the facts so proved were not barred by the statute of limitations, was for the jury to decide, and not the court. This is not like a case of conspiracy, where the conspiracy must be first proved

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before the declarations of any of the conspirators could be proved against any others.

There was no error in thus admitting the testimony.

Appellant further insists that the court erred in refusing to permit him to prove by appellee, while on the witness stand, that at the time appellee discharged appellant from boarding at his house, he "suspected" or "believed" that appellant and appellee's wife were guilty of adultery. Whether this ruling was right or wrong makes but little difference; if wrong, it was afterwards cured by the introduction in evidence, by agreement, of the deposition of appellee, by which it was shown that at the time referred to, from the general intimacy of appellant and appellee's wife, he suspected that there was something wrong, but knew no facts to base more than a suspicion upon.

There was no available error in this ruling of the court.

The fifteenth reason for a new trial calls in question the correctness of the instructions given by the court to the jury, and a part of the second instruction is complained of, which instruction reads as follows: "To entitle the plaintiff to recover, he must prove by a fair preponderance of all the evidence, that Eglantine Miner was his wife; that while she was his wife the defendant debauched and seduced her, as averred in the complaint. And if the jury find from a fair preponderance of the evidence, that the defendant did debauch or seduce the plaintiff's wife, and the defendant has sustained any damage thereby, and such things were done without the connivance or collusion of the plaintiff, then the plaintiff would be entitled to recover, and the amount of such recovery will be the amount of damages shown by the evidence, if any is shown, to which you may add such reasonable amount for exemplary damages as you think the evidence justifies, but such seduction must have been within two years before the 28th day of October, 1881, unless the defendant concealed the same from the knowledge of the plaintiff by some affirmative act."

The objection urged against the instruction is that the court

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instructed the jury that they might add such exemplary damages as they thought the evidence justifies, without stating to them any reasons for adding exemplary damages.

We think the instruction contains a correct statement of the law, as applicable to the facts, and, so far as it goes, as favorable to defendant as he had a right to ask. If he desired a further instruction as to when exemplary damages might be added, he had a right to ask such to be given ; having failed to do so, he must abide by the instruction as given.

The seventh instruction is complained of. It reads as follows : "Should you find for the plaintiff, the measure of damages will be the amount of actual damages sustained by reason of the plaintiff's being deprived of the society, services, comfort and company of his wife, if he was so deprived of any of them, and the distress and anxiety of mind occasioned thereby, in such amount as you may think from all the evidence the plaintiff is entitled, to compensate him for such matters, to which you may add such amount of exemplary or punitive damages as you think right."

The same objection is urged against this as against the second. It was unnecessary for the court to instruct the jury in relation to what kind of cases exemplary damages are applicable. The action of seduction is not like ordinary actions for tort ; in this action, in all cases of guilt, exemplary damages may be allowed. It is in the nature of a fraud upon the injured party. Sedgwick Damages, side p. 542.

The sixth instruction is also complained of, on account of containing the following definition of exemplary damages : "Punitive or exemplary damages are such as the jury in their discretion may assess in addition to actual damages, as a punishment or earnest money, if the act or acts of the wrong-doer were *wilful*."

The use of the word *wilful* is objected to.

The last clause constitutes no part of the definition of the phrase "exemplary damages." It only declares when such damages are applicable ; and, as we have stated, in this respect, the

The Terre Haute and Southeastern Railroad Company v. Rodel.

rule in ordinary actions of tort does not apply to actions for seduction ; if erroneous, it could do appellant no harm. But the word *wilful* frequently means more than mere intention, as insisted upon by appellant. It sometimes is used to mean *perverse*, deliberate design, and malice, and when used in such senses would not be erroneous in actions for ordinary torts. Although it might have been better to have used words of a more definite meaning, we do not think that the use of the word *wilful* had a tendency to mislead the jury to the injury of appellant.

"The record of the whole case shows that the judgment was right on its merits, and in such cases a judgment will not be reversed for harmless intermediate errors." *Toler v. Keiher*, 81 Ind. 383, and authorities therein cited.

There was no available error in overruling the motion for a new trial.

The judgment ought to be affirmed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment of the court below be and it is in all things affirmed, with costs.

89	128
125	477
89	128
128	380
129	349
89	128
148	369
148	370
89	128
162	278
89	128
169	577
169	578

No. 8922.

THE TERRE HAUTE AND SOUTHEASTERN RAILROAD COMPANY v. RODEL.

EJECTMENT.—Streets.—Rights of Abutting Lot Owner.—Easement.—Location of Railroad on Street.—Damages.—The owner of a lot abutting on a street is seized in fee to the center of the street subject to the easement of the public, and may maintain ejectment against a railroad company which has placed its track thereon without payment or tender of damages.

SAME.—Complaint.—A complaint in ejectment, which avers that the plaintiff is seized in fee of a certain lot (giving description), which "abuts on First street, in the city of T. H., and the defendant unlawfully and without right has taken possession of said First street," is good after verdict.

From the Vigo Circuit Court.

The Terre Haute and Southeastern Railroad Company v. Rodel.

J. G. Williams, B. V. Marshall, J. T. Dye and W. P. Fishback, for appellant.

W. Mack, C. F. McNutt and T. W. Harper, for appellee.

ELLIOTT, J.—The question in this case is: Can the owner of a lot abutting upon a street maintain an action of ejectment against a railway company which has laid its track thereon without having paid or tendered compensation?

It is settled that the owner of a lot abutting upon a public street owns to the center, and that his title is a fee burdened only by the easement of the public. It is also the rule in this State that the lot owner may maintain an action against the railroad company for damages. *Cox v. Louisville, etc., R. R. Co.*, 48 Ind. 178; *Terre Haute, etc., R. R. Co. v. Scott*, 74 Ind. 29, auth. p. 38. Counsel for appellant contend that these cases do not decide that an action of ejectment may be maintained. The last of the cases declares that the lot owner may vindicate his rights by the usual legal remedies, and in the first the judge who delivered the opinion declares that ejectment will lie. But, without stopping to consider whether these cases do decide this question, we pass to one which does directly decide it, *Sharpe v. St. Louis, etc., R. W. Co.*, 49 Ind. 296. In that case the action was for possession, and it was held that it would lie. It is true that there is no discussion of the question, and that the opinion is rested entirely upon *Cox v. Louisville, etc., R. R. Co.* We adhere to the conclusion, there reached, for we regard it as sound in principle and supported by authority. The right to possession is in the owner of the fee, for neither the public nor the municipal corporation can maintain an action for possession. Their rights may be vindicated but not in such an action. Certainly, the right to maintain the proper possessory action must reside somewhere, and, as it does not reside in the public or the municipality, it must be in the owner of the fee. It is true that in the case of *City of Cincinnati v. White*, 6 Peters, 431, a different doctrine is

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stated in the opinion, but as shown by Mr. Angell, the question was not involved in that case. The author named, in speaking of the case under immediate mention, says: "It is certainly manifest that the remarks were made upon a very imperfect review of the authorities, if not upon some misapprehension of principle. In regard to the compatibility of the public enjoyment with individual possession, the reasoning of SWIFT, J., in *Peck v. Smith* [1 Conn. 103], would seem to be perfectly conclusive. * * * It supposes that different rights in the use of the same thing may co-exist in different persons; and nothing is more common than for one to have an easement in the land of another, who has an estate in fee and is in actual possession. A private right of way is such an easement. It is compatible with the right of the owner of the fee to depasture and mow it; take the trees and anything growing on it; and hold it in possession for these purposes. If disseized by the grantee of the easement, he can recover possession in ejectment, there being no inconsistency in the recovery subject to the private right of way. The principle is precisely the same in regard to the right of the public in the soil of a highway; its right is but an easement, and, subject to that, it no more conflicts with the right of the public in a highway, than with that of an individual in a private way, for the owner of the fee to recover possession." Angell Highw., section 320. The doctrine that the owner of the fee may maintain ejectment for the land covered by a public highway is as old at least as *Goodtitle v. Alker*, 1 Burr. 133. Lord MANSFIELD there said: "I see no ground why the owner of the soil may not bring ejectment, as well as trespass. It would be very inconvenient, to say that in this case he should have no specific legal remedy; and that his only relief should be repeated actions of damages, for trees and mines, salt springs, and other profits underground. 'Tis true indeed that he must recover the land, subject to the way; but surely he ought to have a specific remedy, to recover the land itself; notwithstanding its being subject to an easement upon it." There are many cases en-

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forcing this doctrine, among them *Cooper v. Smith*, 9 Serg. & R. 26; *Alden v. Murdock*, 13 Mass. 256; *Bissell v. N. Y. C. R. R. Co.*, 23 N. Y. 61; *Carpenter v. Oswego, etc., R. R. Co.*, 25 N. Y. 256; *Jersey City v. Fitzpatrick*, 30 N. J. Eq. 97; *Perry v. New Orleans, etc., R. R. Co.*, 55 Ala. 413 (28 Am. R. 740).

Judgment affirmed.

ON PETITION FOR A REHEARING.

ELLIOTT, J.—In appellant's petition for a rehearing it is argued that our former opinion should not stand, for the reason that the complaint is insufficient. We suppose that no one would seriously contend that the sufficiency of a complaint is before this court unless it was challenged by demurrer in the court below, and error assigned on that ruling, or by motion in arrest followed here by a proper assignment, or else by an assignment here directly questioning the sufficiency of that pleading. In no one of these methods, nor in any form, is the sufficiency of the complaint brought into question. This is a complete answer to so much of the argument on the petition as refers to the validity of the complaint.

Inasmuch as it has been represented to us that other cases are depending on the decision in this, we have thought it proper to decide the question of the sufficiency of the appellee's complaint. The property is specifically described, and this description is followed by the statement "that said real estate abuts on First street, in the city of Terre Haute, and the defendant unlawfully and without right has taken possession of said First street." This description is sufficient, at least after verdict. The owner of a lot abutting on a street owns the fee to the middle thread of the street, and as the pleading gives a full description of the lot, and shows that it abuts on the street, it shows an ownership of the fee to the center of the highway, burdened only by the public easement. This principle is recognized and enforced in many cases. In *Protzman v. Indianapolis, etc., R. R. Co.*, 9 Ind. 467, it was said: "The lot, and street adjoining, then, as to the owner of the former,

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would seem to constitute but one piece of property, and an injury to the latter would seem to be an injury to the former—to the whole property." The court said, in *Terre Haute, etc., R. R. Co. v. Scott*, 74 Ind. 29, that "It is said that in the case of *Cox v. The Louisville, etc., R. R. Co.*, *supra*, the complaint alleged that the plaintiff owned the street in fee; that the demurrer admitted this, and therefore the real question was not involved, though decided by the court. But, clearly the court and counsel engaged in the case regarded the complaint as alleging ownership of the street merely by way of conclusion from the alleged ownership of the lot; and in this we think the court was right. While Cox does aver that he owned the street, etc., he does it in such a way as to show that the averment is simply an inference deduced from his ownership of his lot." On principle, as well as on authority, the just conclusion is that the complaint before us is good, and so we adjudge.

Not a single authority is adduced against the position assumed in the former opinion. We have no doubt at all as to the right of the owner of the fee to maintain ejectment against a wrong-doer, although the fee is burdened by a public easement. Our own cases, as we have shown, so declare, and so do all the well considered cases. The latest discussion of the subject fully sustains our view, and from it we shall not depart. *Sedgw. & Wait Trial of Title to Land*, sections 132, 135.

The ownership of a lot abutting on a highway vests a right to the fee to the center of the highway. We have never seen, nor do we expect to ever see, two deeds, one conveying the lot and the other the land lying in the street. Such a thing could only happen where one employed a conveyancer who had no knowledge of a familiar rule of law. We understand the rule to be perfectly well settled that a conveyance of a lot adjoining a highway carries title to the center. 3 Washb. Real Prop. (4th ed.) 429; 2 Dillon Mun. Corp. (3d ed.), section 633; 3 Kent Com. 434; *Haynes v. Thomas*, 7 Ind. 38. The title of the owner of an abutting lot is, as a matter of law, presumed to extend to the center of the highway. *Rice v. County*

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of Worcester, 11 Gray, 283; *City of Boston v. Richardson*, 13 Allen, 146, *vide* authorities on p. 153. An unlawful entry on the street is an entry on the land of the lot owner. This follows from the doctrine laid down in *Cox v. Louisville, etc., R. R. Co.*, *supra*, and is, in truth, a rudimental principle.

A property owner is not estopped from maintaining his action because he does not forbid the occupancy of the street by the railroad company. There is no element of estoppel present. There is an entire absence of fraud. There is not knowledge on one side and ignorance on the other. As well might a trespasser claim that the true owner is estopped from reclaiming his land because he did not object to the trespasser's using it. If the railroad company had possessed color of title created by the act of the owner, a different question would be presented. No other semblance of title, however, was possessed than such as arose from the act of the owner of the dominant estate. We deem far beyond controversy the proposition, that the owner of the fee can not be ousted from his estate by the acts of the owner of a dominant estate possessing an easement in the land.

Petition overruled.

No. 10,979.

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0157 243

CRIMINAL LAW.—Concealed Weapons.—Evidence.—Venue.—Evidence, in a prosecution for carrying a concealed weapon, from which the jury may reasonably have inferred the venue as laid in the indictment and also the fact of the weapon being carried concealed, is sufficient, in respect to such proof, to sustain a verdict of conviction.

SAME.—Traveller.—Statute Construed.—In such a prosecution, the evidence showed that at the time of the alleged offence, and before and since, the defendant resided in P. county, was extensively engaged in the stave business, having stave yards in various places in that and an adjoining county, that he travelled from his residence in a buggy to and from these several places in attending to his said business, and was so engaged three-fourths of his time. On the day of the alleged offence, while trav-

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elling in his business, he stopped 22 miles distant from his home, at a picnic in P. county, and while there made a harmless exhibition of a pistol to one person, and then replaced it in his pocket.

Held, that the defendant was a traveller within the meaning of the statute (R. S. 1881, sec. 1985), and the evidence insufficient to sustain a conviction.

From the Perry Circuit Court.

W. Henning and H. J. May, for appellant.

F. T. Hord, Attorney General, *S. B. Hatfield*, Prosecuting Attorney, and *W. B. Hord*, for the State.

HAMMOND, J.—Prosecution for carrying a concealed weapon. The indictment was based on section 1985, R. S. 1881, which provides that “Every person, not being a traveller, who shall wear or carry any dirk, pistol, bowie knife, dagger, sword-in-cane, or any other dangerous or deadly weapon concealed, or who shall carry or wear any such weapon openly, with the intent or avowed purpose of injuring his fellow man, shall, upon conviction thereof, be fined in any sum not exceeding \$500.”

On arraignment and plea of not guilty, the appellant was tried by a jury, resulting in a verdict of guilty, and, over his motion for a new trial and exceptions, judgment was rendered upon the verdict. The motion for a new trial questions the sufficiency of the evidence to sustain the verdict; and the overruling of such motion is the only error assigned in this court. The evidence is in the record. The appellant urges that it does not sustain the verdict, for failure to prove the venue; also, that it does not show that he carried the weapon concealed; and, further, that it appears from the evidence that he was a traveller.

The first and second objections to the sufficiency of the evidence are not well taken. There is evidence from which the jury may reasonably have inferred the venue as laid in the indictment, and, also, the fact of the pistol being carried concealed.

As to the appellant being a traveller, the evidence, without conflict, shows that at the time of the alleged offence, and before and since that time, he resided at Cannelton or Tell City in Perry county, and was extensively engaged in the stave busi-

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ness, having stave yards at various places in that county and in Spencer county; and that he travelled from his residence in a buggy to and from these several places in attending to his said business, and was so engaged three-fourths of the time. On the day of the alleged offence, and while travelling in his said business, he stopped 22 miles distant from his residence, at a picnic at Branchville, in Perry county, and while there made, so far as the evidence discloses, a harmless exhibition of a pistol to one person, and then replaced it in his pocket. For carrying the weapon at that time and place, he was prosecuted and convicted.

We are of opinion that the appellant was a traveller, and not amenable to the statute under which he was found guilty.

There has been much discussion as to what constitutes a traveller. In *Lockett v. State*, 47 Ala. 42, under a statute similar to ours in reference to carrying concealed weapons, it was held that a person who was a passenger on a railway train for the distance of 28 miles, seeking employment, was travelling.

The court in that case says: "The word 'travelling' has no very precise or technical meaning when it is used without any limitation. Its primary and general import is to pass from place to place, whether for pleasure, instruction, business, or health. * * * * The length of the journey or its continuance does not destroy the character of the occupation."

In *Coker v. State*, 63 Ala. 95, it was held that the accused was improperly convicted for carrying a concealed weapon while returning, and near his own residence, from a collecting trip which had taken him some 40 miles from his home. For further reference to the authorities upon this question, see reporter's note to *Gholson v. State*, 25 Am. R. 652.

The appellant's motion for a new trial should have been sustained.

The judgment is reversed, and cause remanded, with instructions to the court below to sustain the motion for a new trial, and for further proceedings in accordance with this opinion.

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120	513
89	136
145	876
145	406
89	136
156	210

89 136:
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171 116:

No. 9985

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HADLEY ET AL., TRUSTEES, v. THE WHITE LICK QUAR-
TERLY MEETING OF FRIENDS, BY MENDENHALL ET AL.,
TRUSTEES.

CHURCHES.—*Courts, Ecclesiastical and Civil.—Jurisdiction.—Religious Society.*
—Civil courts in this country have no ecclesiastical jurisdiction. They can not revise or question ordinary acts of church discipline, and can only interfere in church controversies when civil rights, or the rights of property, are involved.

SAME.—*Civil and Ecclesiastical Rights.—Adjudication by Ecclesiastical Tribunal.*
—When a civil right depends upon some matter pertaining to ecclesiastical affairs, the civil tribunal tries the civil right, and nothing more, taking the ecclesiastical decisions out of which the civil right has arisen as it finds them, and accepting those decisions as matters adjudicated by another jurisdiction.

SAME.—*Determination of Doctrinal Questions.*—The civil courts act upon the theory that the ecclesiastical courts are the best judges of merely ecclesiastical questions, and of all matters which concern the doctrines and discipline of the respective denominations to which they belong.

SAME.—*Ecclesiastical Jurisdiction.*—When a person becomes a member of a church, he becomes so upon the condition of submission to its ecclesiastical jurisdiction, and, however much he may be dissatisfied with the exercise of that jurisdiction, he has no right to invoke the supervisory power of a civil court so long as none of his civil rights are involved.

SAME.—*Schism.—Manner of Determining Right to Property of Organization.*—Where a schism occurs in an ecclesiastical organization, which leads to a separation into distinct and conflicting bodies, the respective claims of such bodies to the control of the property belonging to the organization must be determined by the ecclesiastical laws, usages, customs, principles and practices which were accepted and adopted by the organization before the division took place.

SAME.—*Society of Friends.—Organization.—Meetings.—Jurisdiction of.*—The Society of Friends has a regular organization, consisting of a series of religious bodies, holding certain relations to each other, and known as Meetings. The first of these Meetings is the Preparative, organized primarily for worship. The next in grade is the Monthly Meeting, made up of delegates from the Preparative Meetings. The third is the Quarterly Meeting, composed of delegates or representatives from the Monthly Meetings. The fourth is the Yearly Meeting, consisting chiefly of representatives from the Quarterly Meetings, and having a final and con-

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trolling jurisdiction in all matters of faith, religious duty, administration and discipline, within its territorial limits.

SAME.—*Separation of Yearly Meeting.—Recognition by Civil Courts.*—When a Yearly Meeting separates into two distinct and competing bodies, the body which adheres most closely to the ecclesiastical laws and usages under which such Yearly Meeting was brought into existence, and to the acknowledged organism of the Meeting as it existed before the separation took place, and which is recognized by its co-ordinate Yearly Meetings, will be accepted by the civil courts as the true Yearly Meeting.

SAME.—*Quarterly Meeting.—Decision of Yearly Meeting as to Property Rights Binding on Civil Courts.*—When a Quarterly Meeting divides into two separate and conflicting bodies, and one of these bodies, to the exclusion of the other, is recognized by the proper Yearly Meeting as constituting the true Quarterly Meeting, the decision of the Yearly Meeting in that respect, when established as a fact, is binding upon the civil courts as regards questions of property arising out of the division between such separate and conflicting bodies.

SAME.—*Eleemosynary Corporation.*—An eleemosynary charity is, in the general scope of its benevolence, essentially unsectarian, and can only be made sectarian by having such limitations and restrictions placed upon it by the donor as make it so.

SAME.—*Trust and Trustee.*—The mere making of an ecclesiastical organization a trustee for an ordinary eleemosynary charity does not of itself give a sectarian character to the charity.

From the Marion Circuit Court.

E. F. Ritter, L. Ritter, G. W. Grubbs, B. Harrison, C. C. Hines and W. H. H. Miller, for appellant.

J. T. Dye, W. P. Fishback, C. H. Test, J. Coburn and W. R. Harrison, for appellee.

NIBLACK, C. J.—On the 29th day of October, 1868, there was, and for many years previously had been, a religious organization in this State, having its place of meeting in Morgan county, known as the White Lick Quarterly Meeting of Friends.

On that day Catharine Mulloy, a resident of the county of Marion, executed and published her last will, two items of which were as follows:

“ IV. I will and bequeath to White Lick Quarterly Meeting of Friends five hundred dollars (\$500), to be applied at

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the discretion of said Quarterly Meeting for suffering humanity, more especially for the benefit of the freedmen and refugees of the South.

"VII. I will and bequeath to White Lick Quarterly Meeting of Friends one thousand dollars (\$1,000), to be applied at the discretion of said Quarterly Meeting to the education of poor children."

Catharine Mulloy died in 1869. In 1871 the sums of money named in these items of her will were paid to the White Lick Quarterly Meeting by her executor, and were, by the order of that meeting, placed in the hands of Allen Hadley, its agent and trustee duly appointed to receive and to hold the same.

In 1879 the plaintiff in this suit, claiming to be the White Lick Quarterly Meeting of Friends designated in Catharine Mulloy's will, appointed Benjamin Mendenhall, Evan Hadley and Nathan E. Hubbard trustees to receive and hold the moneys so bequeathed to that meeting, and all other trust funds under the control of said Quarterly Meeting, at the same time ordering Allen Hadley to pay over to such trustees the moneys in his hands derived from the estate of Catharine Mulloy, and held by him as trustee, which he, the said Allen Hadley, afterwards, upon demand, refused to do.

The plaintiff thereupon, acting through, and being represented by, the said Benjamin Mendenhall and his associates as its trustees, commenced this suit in the Morgan Circuit Court against Allen Hadley for the recovery of the moneys which he had refused to pay over as above stated.

Allen Hadley answered that there were two bodies of persons claiming to be the White Lick Quarterly Meeting of Friends and demanding control of the funds in his hands, and asked that these bodies should be required to interplead. It was accordingly so ordered.

The other White Lick Quarterly Meeting of Friends, acting through and represented by the said Allen Hadley and Mahlon Johnson and Thomas Elmore, as its trustees, then appeared to the action and filed a cross complaint, averring

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that the White Lick Quarterly Meeting of Friends was set up by the Indiana Yearly Meeting in the year 1831 ; that in the year 1858 the Indiana Yearly Meeting set up the Western Yearly Meeting at Plainfield, in Hendricks county, to which the White Lick Quarterly Meeting became a subordinate organization ; that at the time said Quarterly Meeting was so set up, and long prior thereto, the Society of Friends had accepted and maintained certain fixed and fundamental doctrines and usages, which were set out with much minuteness and detail ; that said doctrines and usages were still accepted and maintained when the will of Catharine Mulloy was executed ; that said Catharine was attached to, and governed in her religious life by, those fundamental doctrines and usages ; that, prior to the death of the said Catharine, certain innovations and departures in faith, doctrine, usages, forms of worship and social habits had been attempted by members of the Society of Friends belonging to the White Lick Quarterly Meeting, and other subordinate organizations within the limits of the Western Yearly Meeting ; that said innovations and departures were persisted in after the death of the said Catharine, and on account thereof an actual and complete division of, and separation between, the members of the said White Lick Quarterly Meeting and the organizations subordinate thereto, took place in November, 1877, resulting at that particular time from a division which had occurred in the Western Yearly Meeting during the preceding September, in consequence of the same innovations and departures ; that since such division and separation there has been two religious societies known as the White Lick Quarterly Meeting, one of which was the plaintiff and the other the cross complainant ; that Allen Hadley was a member of the society constituting the cross complainant, and held the moneys in controversy, subject to the control of that society ; that the cross complainant was the only true and lawful organization known as the White Lick Quarterly Meeting ; that the plaintiff had obtained and retained the records of the White Lick Quarterly Meeting, and the possession of the meeting-

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house belonging thereto, with such a showing of force as rendered it necessary for the cross complainant to ask the interposition of the court in its behalf.

The plaintiff answered the cross complaint, setting forth what purported to be a synoptical description of the organization and internal polity of the Society of Friends, and the relations which its different classes of meetings sustain to each other, and giving a statement as to the manner in which the division of the White Lick Quarterly Meeting was accomplished, and of the action of the Western Yearly Meeting in relation to such division, averring that the persons represented by the cross complainant had separated themselves from the plaintiff without sufficient cause, and that the cross complainant had been set up as a Quarterly Meeting in violation of the established rules and usages of the Society of Friends, and concluding with the further averment that for the reasons given the plaintiff was the White Lick Quarterly Meeting named in the will of Catharine Mulloy.

The cross complainant replied in two paragraphs, the first alleging special matters in avoidance, averring, amongst other things, that the claim of a religious society to belong to the Society of Friends rests upon its faith, doctrines, practices and usages, and not upon the continuity of its organization, and the second making simply a general denial.

Before the issues were completed, the cause was taken by a change of venue to the Marion Circuit Court, where it was tried before the Honorable Ralph Hill, as special judge, without a jury. The finding was for the plaintiff, and after denying a motion for a new trial, a decree was entered in accordance with the finding.

The questions discussed in argument here are only such as arose upon the motion for a new trial.

The evidence is very voluminous, consisting of oral testimony, books, pamphlets and printed matter, all of which have, in some appropriate way, been made a part of the record.

From the evidence we deduce the following facts: The

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Society of Friends has a regular organization, consisting of a series of religious bodies, holding certain relations to each other, and known as Meetings. The first, or lowest of these "Meetings" is the Preparative, organized primarily as meetings for worship, and corresponding in general terms to what are known as congregations in other religious denominations. The next in grade is the Monthly Meeting, made up of delegates from Preparative Meetings. The third is the Quarterly Meeting, composed of delegates or representatives from certain Monthly Meetings. The fourth and highest in authority is the Yearly Meeting, consisting of representatives from all the Quarterly Meetings within certain territorial limits. Each subordinate Meeting is required to report to its immediate superior at stated times. Besides the delegates and representatives, the members of the society generally are entitled to attend all the Meetings and to participate to a greater or less extent in their proceedings. The greater part of the merely disciplinary and administrative business of the society is transacted at the Monthly Meetings, but their proceedings may be reviewed by the Quarterly Meetings and appeals may be still further taken to the Yearly Meetings. Each Yearly Meeting has a final and controlling jurisdiction in all matters of faith, religious duty, administration and discipline within its territorial limits, and is regarded as a co-ordinate supreme judicatory with other Yearly Meetings, all constituting the ecclesiastical system known as the Society of Friends.

This general plan of organization is adhered to by all classes of English-speaking people claiming to be Friends, but more generally known as Quakers. Instead of general conventions, general conferences, or other general assemblages of some kind, as is provided for in most other religious organizations, the Society of Friends has adopted a system of correspondence and fraternal communication, between its Yearly Meetings in unity and general accord, with each other, which is carried on by means of epistles, liberating certificates, visits, interchanges of ministers and general letters of recommendation.

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By this system of intercommunication each Yearly Meeting receives information from time to time as to the general condition of all the other Yearly Meetings with which it is in correspondence, and is afforded an opportunity of consulting such other Yearly Meetings in all affairs of serious difficulty or of grave importance.

In matters of correspondence, and of an advisory character merely, the Yearly Meeting of England, which assembles at London, and which was organized and established more than two hundred years ago, has usually had accorded to it that kind of precedence which is quite frequently, if not usually, conceded to the oldest member of a family, and correspondence with, and consequent recognition by, that Yearly Meeting has been regarded by most, if not all, the Yearly Meetings on this continent, as a matter of considerable, if not of very great, importance. But the extent to which this precedence has been accorded to the London Yearly Meeting, and the importance of recognition by that Yearly Meeting, are matters of some controversy in this action.

The fact, however, that a Yearly Meeting maintains correspondence with the London Yearly Meeting, and with such other Yearly Meetings as it holds fraternal relations with, affords a circumstance strongly tending to establish regularity in the organization and continued existence of such Yearly Meeting. Until within a comparatively recent period the fact that a Yearly Meeting maintained such a correspondence was accepted by all persons claiming to be Quakers as sufficient evidence of its regular standing as an organization belonging to the Society of Friends.

In the peculiar phraseology of the Society of Friends, a meeting is said to have been "set up," when it has been organized according to the usages of the society, and to have been "laid down," when it has been formally dissolved.

A new Yearly Meeting is set up by some contiguous or convenient Yearly Meeting, but only with the consent of all the

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Yearly Meetings with which such contiguous or convenient Yearly Meeting is in unity and fellowship.

When a new Yearly Meeting is set up, it acquires jurisdiction over all subordinate meetings already established within its territory. Quarterly Meetings are set up by the proper Yearly Meeting; Monthly Meetings are set up by the Quarterly Meetings, and the Preparative Meetings are set up by the Monthly Meetings.

The clerk of the Meeting is, in a qualified but, nevertheless, in a general sense, its presiding officer, as well as the recorder of its proceedings, and during his term in office he stands at the head of the organization which constitutes the Meeting. The Meeting itself is frequently contradistinguished from others by a reference to him as its clerk. When, therefore, a clerk has been regularly appointed the Meeting is fully organized and ready to proceed with its business.

The manner of transacting business at the Meetings of Friends is peculiar to the people who compose those Meetings. Unanimity is sought in every reasonable way. Unless the emergencies of business absolutely require a different course of proceeding, immediate action is not demanded upon any proposition to which there is serious opposition. The results of their deliberations are not determined by a majority vote, or any other proportionate number of members. No division of members is ever called for or vote ever taken. No protest is suffered to be entered, and silence is construed as giving consent. The members look and wait for an union of minds, and endeavor to reach a conclusion by a courteous yielding up of opinions in deference to those most competent to judge of the measure proposed, or by an acquiescence in what appears to be the prevailing sentiment amongst those who are present. If entire unity is not made manifest the clerk proceeds to collect what appears to him to be the "solid sense" of the Meeting.

In thus gathering the sense of the Meeting the clerk takes into consideration the number, age, intelligence, experience,

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piety and other distinguishing traits of those uniting with, and of those opposing, the measure, acting upon the theory that the spirit of divine truth is assisting him in his work. He then makes a minute of the sense of the members present, as he has gathered it, and reads it to the Meeting. If the minute so made is acquiesced in to the extent that practical unanimity is secured, it is recorded as the action of the Meeting; but if it is not so acquiesced in the measure is either modified, postponed, withdrawn or dismissed entirely.

In 1831 the White Lick Quarterly Meeting was set up by the Indiana Yearly Meeting, whose place of meeting then was and still is in the city of Richmond, in this State, and of whose territory Morgan county then formed a part.

In 1858, the Western Yearly Meeting was also set up with its place of meeting at Plainfield, in Hendricks county, by the Indiana Yearly Meeting, with the consent and acquiescence of the London, Dublin, New England, New York, Baltimore, North Carolina and Ohio Yearly Meetings, with all of which it was at the time in correspondence, and, after being so set up, the Western Yearly Meeting entered into a correspondence and fraternal relations with all of these Yearly Meetings which had participated as above in the work of setting it up. When the Western Yearly Meeting was brought into existence, the White Lick Quarterly Meeting fell within the territory assigned to it and became one of its subordinate organizations. After the Western Yearly Meeting was set up, Yearly Meetings were also set up in Iowa, Kansas and Canada, with the consent of that Meeting and the other Yearly Meetings which had taken part in its formal organization. The relations between all the Yearly Meetings above enumerated continued as they had begun until the meeting of the Western Yearly Meeting on the 14th day of September, 1877, at which time that Yearly Meeting was composed of 14 Quarterly Meetings, with a church membership of between 12,000 and 14,000 persons. The White Lick Quarterly

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Meeting was one, and the Plainfield Quarterly Meeting constituted another of these 14 Quarterly Meetings.

At its session of 1865, the Western Yearly Meeting revised and adopted a discipline for the Society of Friends within its jurisdiction which was published in book form during the ensuing year. That discipline, which was in force during the year 1877, contained a provision which remains in force, that the representatives from the Quarterly Meetings to the Yearly Meeting are annually to choose a clerk and an assistant or assistants, at the close of the first day's sitting of the Yearly Meeting for discipline, whose names are to be reported at the opening of the next sitting.

During the summer of 1877 some difficulty and disorganization occurred at a meeting of the Plainfield Quarterly Meeting, which resulted in sending two reports and two sets of representatives to the Yearly Meeting, both reports purporting to be from that Quarterly Meeting. One of these reports was signed by Oliver Albertson as clerk, and the other was signed by Albert Maxwell in the same capacity.

When the Western Yearly Meeting came together on the 14th day of September, 1877, it met at a meeting-house in Plainfield, at which it had theretofore been accustomed to assemble. During its first day's sitting the two reports from the Plainfield Quarterly Meeting were referred to the representatives of all the other Quarterly Meetings for examination and report.

At the close of that day's sitting the representatives of all the Quarterly Meetings, except the Plainfield, assembled and chose a clerk and two assistants, whose names are hereafter given, also considered the two reports from the Plainfield Quarterly Meeting, and agreed to the recommendation they should make concerning those reports as it was afterwards reported to the Yearly Meeting.

When the Yearly Meeting assembled next morning Aquilla H. Pickering, on behalf of the representatives, proposed Bar-

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nabas C. Hobbs for clerk and Elwood C. Siler and John A. Taylor for assistants. These persons were approved, and appointed to serve, as proposed, for the ensuing year. The representatives then reported that the report purporting to come from the Plainfield Quarterly Meeting, and signed by Oliver Albertson, was the correct and official report from that Quarterly Meeting. This report was concurred in by the Yearly Meeting, and the names of the representatives contained in the report signed by Oliver Albertson were directed to be placed in their proper order on the list, with the representatives from the other Quarterly Meetings. After these proceedings were taken, one of the members in attendance, who had united with the quarterly report signed by Albert Maxwell, stated in substance to the Meeting, that as the friends of that report had been rejected he proposed that Friends feeling aggrieved should withdraw from the Meeting to some other place to transact the business for which the Western Yearly Meeting had convened.

Another member, also in attendance, seconded this proposition by announcing that for the purpose of maintaining the doctrines of the Society, and of transacting the business of the Meeting, according to the order and usages of Friends, all persons wishing to do so were invited to retire from the Meeting then in session.

A considerable number of persons, all members of the Society of Friends, thereupon withdrew to a school-house near by, and organized a Yearly Meeting, to be known as the Western Yearly Meeting, and proceeded to transact the business of a Yearly Meeting, upon the assumption that the Meeting so organized constituted the original, genuine and regularly established Western Yearly Meeting. Out of between 60 and 70 representatives who had been admitted to seats in the Yearly Meeting which had assembled at the meeting-house only two participated or assisted in the organization of the Yearly Meeting at the school-house. One of these was from the Plainfield, and the other from the Union, Quarterly

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Meeting. The Yearly Meeting thus organized at the school-house has since continued to meet regularly at Sugar Grove, a place about two miles south of Plainfield, under the name of the Western Yearly Meeting, and for convenience of identification may be called the Sugar Grove Yearly Meeting.

The Yearly Meeting which had met at the meeting-house, and which, for convenience, may be designated as the Plainfield Yearly Meeting, continued in session after the separation, retaining the minutes and all other records and papers pertaining or belonging to the Western Yearly Meeting, and, without making any note of the withdrawal of a part of its members, apparently transacted all business which had come, or afterwards came, before it, after which it closed in the usual form, to meet the following year.

In 1878 the same body, that is to say, a Yearly Meeting represented by the same officers and composed of representatives purporting to be from the same Quarterly Meetings, and acting in general conformity with the discipline which had been adopted for the government of the Western Yearly Meeting in 1865, as herein above stated, assembled at the same meeting-house in Plainfield, on the day provided in that discipline, and under the name of the Western Yearly Meeting, proceeded to transact the current business of the year, ostensibly within the jurisdiction of that Meeting.

Since then, the same ecclesiastical organization, claiming to be the true and only Western Yearly Meeting, has, in the same manner, met regularly and annually at Plainfield, and has continued in correspondence, and in unity and fellowship, with the same Yearly Meetings with which the Western Yearly Meeting was in correspondence, and in unity and fellowship, before the separation in 1877. Soon after these two contesting Yearly Meetings closed their sessions in 1877, each sent a copy of its minutes to the White Lick Quarterly Meeting, as both doubtless did to other Quarterly Meetings, and when that body met in November, 1877, at the town of Mooresville, in Morgan county, its regular place of meeting,

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its clerk informed the Meeting that minutes of two bodies, each claiming to be the Western Yearly Meeting, had been placed in his hands and were upon its table for its consideration, and suggested that as the White Lick Quarterly Meeting had only been represented in the Yearly Meeting which had met and continued its session at the meeting-house at Plainfield, he thought the proper course would be to accept and give preference to the minutes of that Yearly Meeting. That suggestion was approved by the White Lick Quarterly Meeting, and it was ordered that the last named minutes be received and adopted as the official minutes of the Western Yearly Meeting. Before proceeding to any other business, the clerk was requested to wait a few moments that those feeling dissatisfied with the action which the Meeting had just taken might have an opportunity of being heard. A statement was then made of the objections which existed in the minds of many members to the reception and adoption of the minutes of the Plainfield Yearly Meeting, basing these objections upon the alleged ground that that Yearly Meeting had tolerated and permitted many innovations upon the doctrines and practices of the Society of Friends, in opposition to the views of a large class of members, who believed in a strict adherence to those doctrines and practices, and who had the right to insist upon a strict adherence to them. The announcement was then made that many persons present felt it to be their duty to withdraw from the Meeting, and, accordingly, 20 or 25 members did withdraw, leaving the clerk and 200 or more persons with the records and minutes of the White Lick Quarterly Meeting in possession of the meeting-house, who continued in session as a Quarterly Meeting, without the slightest show of force, either then or at any time afterwards. These withdrawing members assembled in the meeting-house yard and initiated measures for the organization of a Quarterly Meeting, to be known as the White Lick Quarterly Meeting, first appointing a clerk to act for the occasion. They then adjourned over for a few days, to meet at West Union,

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a meeting-house near Monrovia, in Morgan county. At the time appointed these withdrawing members assembled at West Union and proceeded to complete their organization as a Quarterly Meeting. The Quarterly Meeting thus organized has ever since met regularly, either at West Union or at a place called Beech Grove, under the name of the White Lick Quarterly Meeting, and transacted such business as usually comes before a Quarterly Meeting, acting upon the avowed claim that it constitutes the true and lawfully established White Lick Quarterly Meeting, simply reorganized in the interest of orthodox religion, and for the preservation and perpetuation of the ancient faith, doctrine and practice of the Society of Friends, and it is that Quarterly Meeting which appears as the cross complainant in this action.

After the organization of that Quarterly Meeting Allen Hadley united with it, and has continued to be a member of it, acknowledging and asserting it to be the White Lick Quarterly Meeting mentioned in Catharine Mulloy's will.

In 1878 this Quarterly Meeting sent representatives to the Sugar Grove Yearly Meeting, and has ever since been recognized as a component part, and as within the ecclesiastical jurisdiction of that Yearly Meeting, still continuing to send representatives regularly to its annual Meetings.

The Quarterly Meeting which continued in session at the White Lick meeting-house after the withdrawal of a part of the members, who met with those remaining as herein stated, and which is the plaintiff in this suit, has since held regular meetings at the same meeting-house, retaining the name of the White Lick Quarterly Meeting, and discharging all the functions of a Quarterly Meeting. It has sent representatives regularly to the Plainfield Yearly Meeting since the separation, and has been dealt with and treated by that Yearly Meeting as one of its subordinate organizations, and as the White Lick Quarterly Meeting which was in existence and fully represented in the Western Yearly Meeting when it assembled in September, 1877, prior to the separation.

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At the time of the separation between its members, the White Lick Quarterly Meeting was composed of two Monthly Meetings—the White Lick and the West Union. The White Lick Quarterly Meeting, now appearing as plaintiff, is made up of two Monthly Meetings of the same names, and purporting to be the same Monthly Meetings. The cross complainant, White Lick Quarterly Meeting, has, ever since soon after its organization, been composed of two Monthly Meetings known as West Union and Beech Grove.

Those known by the general name of Friends, and residing upon the American continent, are divided into three principal groups of Yearly Meetings. The first of these groups comprises all of the Yearly Meetings which are in correspondence and in regular fraternal relations with the London Yearly Meeting, and to which we have already referred. Of this group the New England, formerly known as the Rhode Island, Yearly Meeting is the oldest American Yearly Meeting. The second embraces those Yearly Meetings which have their origin in a division of the Society of Friends, commencing in the year 1827, in which Elias Hicks, a minister of the Society, bore a prominent part. Those constituting these Meetings are known in common parlance by the distinguishing name of Hicksite Quakers. The third is composed of a class of Yearly Meetings which, in the matter of their immediate organizations, are of a still more recent date. Those uniting with this class of Yearly Meetings, as between themselves and others claiming to be Quakers, prefer to be known as Orthodox Friends.

These Yearly Meetings base their claims to regularity in their organizations upon their avowed adherence to the ancient principles of Quakerism, and upon the orthodoxy of their sentiments as Quakers on the general subject of religion. It is to this group that the Sugar Grove Yearly Meeting belongs, and with which it is in correspondence and in unity. It has never been in correspondence, or in regularly recognized fra-

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ternal relations, with any of the Yearly Meetings constituting the first group.

The position of the Philadelphia Yearly Meeting is somewhat anomalous. It is next to the oldest, and, in some respects, has been, and perhaps continues to be, one of the most influential Yearly Meetings on this continent, and on terms of courtesy and friendship with many other Yearly Meetings ; yet, owing to some internal difficulties and disagreements as to what relations it ought to sustain to certain other bodies claiming to be Yearly Meetings, it has ceased to have regular correspondence with any other Yearly Meeting. We, consequently, find it difficult, if not impracticable, to classify it with any one of the groups of Yearly Meetings to which we have referred.

With these facts before us, the question for decision is, which of the two ecclesiastical bodies bearing the name of the White Lick Quarterly Meeting constitutes the Quarterly Meeting to which Catharine Mulloy made her bequests ?

Civil courts in this country have no ecclesiastical jurisdiction. They can not revise or question ordinary acts of church discipline, and can only interfere in church controversies where civil rights or the rights of property are involved. Where a civil right depends upon some matter pertaining to ecclesiastical affairs, the civil tribunal tries the civil right, and nothing more, taking the ecclesiastical decisions, out of which the civil right has arisen, as it finds them, and accepting those decisions as matters adjudicated by another jurisdiction. The civil courts act upon the theory that the ecclesiastical courts are the best judges of merely ecclesiastical questions, and of all matters which concern the doctrines and discipline of the respective religious denominations to which they belong. When a person becomes a member of a church he becomes so upon the condition of submission to its ecclesiastical jurisdiction, and however much he may be dissatisfied with the exercise of that jurisdiction, he has no right to invoke the supervisory power of a civil court so long as none of his civil rights are invaded.

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This doctrine inevitably results from that total separation between church and state which exists within the limits of the United States, and is essential to the full enjoyment of the guaranteed rights of American citizenship. Very naturally a different rule prevails in England, where church and state are united.

In commenting upon the powers and duties of the civil courts in cases arising out of church controversies, the Supreme Court of the United States, in the case of *Watson v. Jones*, 13 Wal. 679, on p. 727, says:

"In this class of cases we think the rule of action which should govern the civil courts, founded in a broad and sound view of the relations of church and state under our system of laws, and supported by a preponderating weight of judicial authority, is, that, whenever the questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by the highest of these church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final, and as binding on them, in their application to the case before them." And, again, on p. 727: "It is of the essence of these religious unions, and of their right to establish tribunals for the decision of questions arising among themselves, that those decisions should be binding in all cases of ecclesiastical cognizance, subject only to such appeals as the organism itself provides for."

In *Harrison v. Hoyle*, 24 Ohio St. 254, which was a case growing out of a division in the Society of Friends, and very closely resembling the present case in its leading features, the court closes a very elaborate opinion with the following statement of principles: "Civil courts, in determining the question of legitimate succession, in cases where a separation has taken place in a voluntary religious society, will adopt its rules, and will enforce its polity in the spirit and to the effect for which it was designed. When public policy, or the positive law of the land, is not contravened, the decisions and orders of the society, when made in conformity to its polity, should have the

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same effect, upon the subject to which they relate, in civil courts, which the society intended should be awarded to them when pronounced by its own judicatories. If such society be composed of separate bodies, whether co-ordinate or subordinated, the rules of the society for the management of its internal affairs, and for the adjustment of the relations between its branches, constitute the law by which they should be governed."

In *Chase v. Cheney*, 58 Ill. 509, the court, in summing up the case, says: "A rector in the church is charged with non-conformity to its doctrines; intentional omissions in the ministrations of its ordinances; and the attempt is made to organize a court, composed of his brother clergymen, for his trial. He appeals to the civil court, and alleges as the chief reason for interposition, the want of authority in the spiritual court to try him, and a misconstruction of the canons. * It was urged, with the same earnestness, and enforced with the same arguments there as here. The court overruled the objection, and decided that it had jurisdiction. Five intelligent clergymen of the church, presumed to be deeply versed in biblical and canonical lore, were more competent than this court to decide the peculiar questions raised. Why should we review that, and not every other decision which involves the interpretation of the canons? It is conceded that when jurisdiction attaches, the judgment of the church court is conclusive, as to purely ecclesiastical offences. It should be equally conclusive upon doubtful and technical questions, involving a criticism of the canons, even though they might comprise jurisdictional facts."

In *Baptist Church v. Witherell*, 3 Paige, 296, WALWORTH, Chancellor, says: "All questions relating to the faith and practice of the church and its members belong to the church judicatories, to which they have voluntarily subjected themselves."

In *Lawyer v. Cipperly*, 7 Paige, 281, the same learned jurist says: "The church, or spiritual body, as to its doctrine, government and worship, is to be governed and regulated by its own peculiar rules."

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In *Miller v. Gable*, 2 Denio, 492, it is said by GARDINER, President: "It must be a plain and palpable abuse of trust which will induce a court of equity to interfere, respecting a controversy growing out of a difference in religious and sectarian tenets."

In *Watkins v. Wilcox*, 66 N. Y. 654, the language above copied from *Miller v. Gable* is quoted with approbation.

In *Bowden v. McLeod*, 1 Edwards Ch. 588, the Vice Chancellor, in speaking of the jurisdiction of the civil court over churches, says: "It has nothing, immediately, to do with their spiritual concerns, church government, discipline, faith, doctrines or modes of worship. These are matters which are to be left to the regulation of their own peculiar tribunals and the ecclesiastical judicatories of each church."

In the case of *Smith v. Nelson*, 18 Vt. 511, where a legacy was left to the Associate Congregation of Ryegate, the interest whereof was to be annually paid to their minister forever, it was held that though the Ryegate congregation was one of a number of Presbyterian churches connected with the general body of the Presbyterian church, the only enquiry was whether the society still existed, and whether they had a minister chosen and appointed by the majority and regularly ordained over the society, agreeably to the usage of that denomination. In the course of his opinion in that case the Chief Justice says: "This court, having no ecclesiastical jurisdiction, can not revise or question ordinary acts of church discipline. Our only judicial power in the case arises from the conflicting claims of the parties to the church property and the use of it. We can not decide who ought to be members of the church, nor whether the excommunicated have been, justly or unjustly, regularly or irregularly, cut off from the body of the church."

In the case of *German Reformed Church v. Seibert*, 3 Pa. St. 282, the Supreme Court of Pennsylvania concludes by saying: "The decisions of ecclesiastical courts, like every other judicial tribunal, are final; as they are the best judges of what

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constitutes an offence against the word of God and the discipline of the church. Any other than those courts must be incompetent judges of matters of faith, discipline and doctrine ; and civil courts, if they should be so unwise as to attempt to supervise their judgments on matters which come within their jurisdiction, would only involve themselves in a sea of uncertainty and doubt, which would do anything but improve either religion or good morals."

The case of *Harmon v. Dreher*, 1 Speers Eq. 87, turned upon certain rights in the use of the church property claimed by Dreher, the minister, notwithstanding his expulsion from the Synod of the church as one of its members. "He stands, therefore," said the Chancellor, "convicted of the offences alleged against him, by the sentence of the spiritual body, of which he was a voluntary member, and whose proceedings he had bound himself to abide. It belongs not to the civil power to enter into or review the proceedings of a spiritual court. The structure of our government has, for the preservation of civil liberty, rescued the temporal institutions from religious interference. On the other hand, it has secured religious liberty from the invasion of the civil authority. The judgments, therefore, of religious associations, bearing upon their own members, are not examinable here ; and I am not to enquire whether the doctrines attributed to Mr. Dreher, were held by him, or whether, if held, they were anti-Lutheran ; or whether his conduct was, or was not, in accordance with the duty he owed to the Synod, or to his denominations." Page 120.

Where a schism occurs in an ecclesiastical organization which leads to a separation into distinct and conflicting bodies, the respective claims of such bodies to the use of the property belonging to the organization must be determined by the principles which underlie the control of voluntary associations. If there be within the organization officers or duly appointed persons in whom the powers of such control are vested, those who adhere to the acknowledged organism by which the organization is governed are entitled to the use of

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the property without reference to whether they constitute a majority of members. The title to the property of a divided church is in that part of the organization which is acting in harmony with its own law; and the ecclesiastical laws, usages, customs, principles and practices, which were accepted and adopted by the church before the division took place, constitute the standard for determining which of the contesting parties is in the right. *Watson v. Jones, supra*; *McGinnis v. Watson*, 41 Pa. St. 9; *Winebrenner v. Colder*, 43 Pa. St. 244; *Schnorr's Appeal*, 67 Pa. St. 138 (5 Am. R. 415); *Roshi's Appeal*, 69 Pa. St. 462 (8 Am. R. 275).

An eleemosynary charity, like those provided in the will of Catharine Mulloy, is essentially unsectarian in the general scope of its benevolence, and such a charity can only become sectarian by having such limitations and restrictions placed upon it by the donor as make it so.

The making of an ecclesiastical society a trustee merely for an ordinary eleemosynary charity does not of itself give a sectarian character to the charity, and if no limitations or restrictions are imposed to the contrary, the ecclesiastical body may continue in possession of the charity as its trustee so long as it continues to be essentially and characteristically the same organization, without reference to changes or modifications which it may make in matters of mere detail, or of relatively subordinate importance, connected with its faith, doctrine and practices. *Attorney General v. Moore*, 19 N. J. Eq. 503; *Watkins v. Wilcox, supra*.

Where a charity is, by a proper instrument in writing, devoted to the propagation, support or sustenance of certain definite religious doctrines or principles, the civil courts will see to it that the property or money so dedicated is not diverted from the purposes for which it is set apart. In such a case it is the use to which the property or money is or has been applied, and not the faith, doctrines or religious practices of the trustee, which is the subject of enquiry.

In this general class of cases it is only where certain

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specific doctrines, views or religious practices have become a distinguishing characteristic in the identification of the trustee that his or its peculiar doctrines, views or religious practices, can be made a proper matter of judicial investigation.

When the Western Yearly Meeting met in 1877, it assembled, as already stated, at the time and place prescribed in its book of discipline, which, for all practical purposes, was its written constitution. At that time its regular standing as a Yearly Meeting of the Society of Friends stood unchallenged, save by a class of religionists whom its members regarded as separatists and schismatics. The laws of its creation and continued existence were based upon the theory that it was one of a group of Yearly Meetings, forming a body which constituted the true Society of Friends, and whose regularity of organization had been recognized in principle by the noted cases of *Earle v. Wood*, 8 Cush. 430; *Hendrickson v. Decow*, 1 Saxton, 577; *Harrison v. Hoyle*, 24 Ohio St. 254; and, perhaps, other less important cases.

The members of that Yearly Meeting were, impliedly at least, committed to the correctness of the theory upon which the laws of its creation and existence were thus based. That Meeting proceeded regularly to business, and, at the times indicated for those purposes in its discipline, first nominated and then appointed a clerk and his two assistants, thus fully reorganizing the body as a Yearly Meeting for the ensuing year. The action which it took in regard to the contesting delegations from the Plainfield Quarterly Meeting was in accordance with the usages of the society, and with the inherent powers of all unrestricted representative bodies, amenable only to parliamentary law. Whether, therefore, abstractly right or abstractly wrong, its action in respect to those conflicting delegations was neither revolutionary nor irregular, and worked no innovation or departure either in discipline or in parliamentary usages when seats in the constituent body are contested.

No objection appears to have been made to any specific proceeding of the Meeting upon the ground that it was an

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innovation upon the ancient doctrines or usages of the Society, and nothing has been shown by the evidence of which complaint is specifically made of the Yearly Meeting in that respect. The charge, therefore, that the Yearly Meeting had improperly tolerated innovations and departures in matters of faith or of doctrine, or in the methods of conducting religious worship, is not sustained by the evidence.

The withdrawal of a part of the members, when the report signed by Albert Maxwell was rejected, presents what appears to us to have been a case of persons who had become dissatisfied with their religious associations and surroundings, and who had resolved to seek new affiliations and, if possible, a more congenial religious atmosphere, regardless of any question of regularity in the manner of their withdrawal. These members had the lawful right to withdraw as they did, and, for aught we know to the contrary, they had also the moral right to do so. It may be that as a result of their withdrawal they have been enabled to form better religious associations, and that thereby their chances of securing divine favor have been greatly enhanced. These are matters concerning which we are not permitted to judge, and about which, in any event, we feel ourselves to be incompetent to express an authoritative opinion. We, as judges of a merely civil court, have not been trained for, and are hence very properly not chargeable with, the decision of such questions. The inevitable conclusion, however, seems to us to be that when these dissatisfied members withdrew and entered a new, independently organized and conflicting religious body, they did so in violation of the usages, customs, traditions and discipline of the Western Yearly Meeting to which they had theretofore adhered, and that they by that means severed their connection with that Yearly Meeting, since distinguishably known as the Plainfield Yearly Meeting.

Applying the law as we have stated it to the facts as we have deduced them from the evidence, the conclusion appears to us to be equally inevitable that the Plainfield Yearly Meet-

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ing constitutes the continuous and true Western Yearly Meeting set up and established at Plainfield in 1858.

As must have been observed, the charities in controversy in this case have no sectarian limitations or restrictions placed upon them. The White Lick Quarterly Meeting is made a trustee for charitable, and not distinctly religious, purposes. The real questions at issue are, consequently, those of organization and identity, and not of doctrine or particular methods of worship.

The general principles we have applied to the separation which occurred in the Yearly Meeting are alike applicable to the separation which afterwards took place in the White Lick Quarterly Meeting.

If the Quarterly Meeting organized by the withdrawing members had applied to the true Western Yearly Meeting for recognition and had been admitted to representation in that Meeting as the regular White Lick Quarterly Meeting, a very different question from anything now before us would have been presented.

Instead, however, of so applying to the true Yearly Meeting, the new organization sought and obtained admission as a member of the Sugar Grove Yearly Meeting, which, for the reasons given, must be regarded as an irregularly organized Yearly Meeting, and as belonging to a group of Yearly Meetings with which the true Western Yearly Meeting has never been in unity and fellowship. In many essential respects, therefore, the new organization, in its relations to the Society of Friends, occupies positions quite different from those sustained by the White Lick Quarterly Meeting prior to and at the time of the separation.

Up to and at the time of the assembling of the White Lick Quarterly Meeting, in November, 1877, it had been, and still was, in undisputed subordination to, and in fraternal relations with, what we have designated as the Plainfield Yearly Meeting. It could not, therefore, have consistently done otherwise than accept the minutes of that Yearly Meeting as the official minutes of the Western Yearly Meeting.

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Those who remained in the meeting-house after the withdrawing members left it, and adhered to the organism which was represented by the Meeting when it first assembled, retained all the attributes of a regularly constituted Quarterly Meeting, and having been since continuously recognized by the proper Western Yearly Meeting as the true White Lick Quarterly Meeting, that recognition is binding upon us as the decision of a tribunal having a peculiar jurisdiction to decide such and all kindred questions, and is hence practically decisive of the controlling question in issue in this cause.

Numerous questions were reserved at the trial by the cross complainant upon offers and rejection of evidence. The excluded evidence, concerning which complaint is made, all had reference to the faith, doctrine, usages or modes of worship of the Society of Friends, and was offered as tending to establish either the orthodoxy of the cross complainant in such matters on the one side, or the heterodoxy of the plaintiff on the other.

The inference from what has been said necessarily is that the court did not err in excluding the rejected evidence. Our laws have erected no standard by which either the orthodoxy or heterodoxy of a religious body may be judged, and will not impose any implied sectarian limitations or restrictions upon charities which have not been expressly so limited or restricted. It was not at any time proposed to show that either the Western Yearly Meeting or the White Lick Quarterly Meeting had, in its organic capacity, at any time authorized or sanctioned any innovation upon the faith or doctrines of the Society, or any essential departure in its usages or practices. All that was proposed had reference to alleged disorderly conduct on the part of individual members of the Society which had not been taken notice of by any of the Meetings within the Western Yearly Meeting limits, and of which no formal complaint was ever seemingly made to any Meeting.

The evidence impresses us as not establishing such an in-

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flexible rule regarding the faith, doctrines and practices of the Society of Friends as is contended for by the cross complainant.

Clarkson, a writer of note on the subject of Quakerism, in treating upon the nature and jurisdiction of Yearly Meetings, at page 95, says: "Among the subjects introduced at this Meeting may be that of any new regulations for the government of the Society. The Quakers are not so blindly attached to antiquity as to keep to customs merely because they are of ancient date; but they are ready, on conviction, to change, alter and improve."

In the case of *Earle v. Wood, supra*, in a very elaborate opinion delivered by Chief Justice SHAW, the Supreme Court of Massachusetts said:

"It would seem to be inconsistent with the nature and principles of the Quaker system, as far as it is disclosed in the case before us, to be bound down, as a body, as a Christian denomination, to a precise and unbending rule in matters of speculative opinion. They profess to believe in the continued influence and presence of the Holy Spirit to the mind of each individual, humbly waiting for its manifestation to aid in the discovery of divine truth. It would seem, therefore, that they must suppose it possible, that new truths may be discovered and so manifested as to require the assent of the true disciple, and thus add something to his existing faith. It is also true, as we understand, that they profess to believe that the Scriptures are given by inspiration, and are the unerring guide to Christian truth; and that if any man supposes he has an inward light, contrary or repugnant to the truth of the scriptures, it can not be a true light. But perhaps there is no inconsistency in believing that the Scriptures of the Old and New Testaments are a true and unerring guide to divine truth, yet that all the truths of Scripture have not been made manifest to the imperfect mind of man, and in the language of Father Robinson, of Leyden, that 'More truth is yet to

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break forth from the Holy Scriptures.' Should such be the fact; should the testimony of the Scriptures and the influences of the Holy Spirit concur in bringing to the conviction of humble, sincere and enquiring minds, the knowledge of further Christian truths, manifested with a brilliancy and clearness not to be mistaken; it seems perfectly consistent with the avowed principles of the Society of Friends, to adopt and sanction them, although they were not known to Pennington, Barclay, Fox and the respected founders of their Society, and under a full belief that if the same light had been thrown on the same truths in their day, these sincere and seeking men would have humbly and devoutly embraced them.

"We would not be supposed by this, to intimate that the Quakers have no creed, no theological tenets, to which they are strongly attached, and no superintending watchfulness over the soundness of the faith of their members and subordinate Meetings, or that they allow any great latitude of discussion to their members on theological subjects. On the contrary, the discipline expressly prohibits the publication of all writings relating to their religious principles or testimonies unless first laid before the meeting for sufferings, for their advice and concurrence, and their approval of them obtained.

"What we mean to say is this; that if after solid and weighty consideration, humbly and conscientiously awaiting the guide of best wisdom, the Yearly Meeting should fully unite in the proper as well as the Quaker sense of that term, in adopting some modification of their creed, or of their speculative opinions, adhering to their great principles of love and fraternal duty, it would, upon their professed principles, seem too much to say, that they would thereby cease to be Quakers, and cease to be the Society of Friends. Especially we think, this could not be asserted by Meetings and individuals subordinate to them, who owe, ecclesiastically, allegiance to them, and to whom, so long as they remain subordinate, the decisions are final and infallible, as well in matters of faith as of conduct."

It is a matter deducible from history, as well as from the

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current religious literature of the times, that every church and every principal ecclesiastical denomination claiming to be founded upon Christian principles, or composed of persons calling themselves Christians, has within itself some *quasi* legislative or supreme power having control over matters of doctrine as well as discipline, and having some jurisdiction at least over what pertains to the faith as well as the practices of its members. With the knowledge of this fact in our minds, and with the evidence in this case before us, we can not say that the extract, taken as above from the opinion delivered by Chief Justice SHAW, states the power of the Yearly Meetings in ecclesiastical affairs too strongly, and especially when they act in unity and in co-operation with each other.

What we have said and set out as above on the subject of the ultimate and possibly extreme power of the Yearly Meetings over matters of doctrine as well as discipline, has no material bearing upon any question directly involved in this case, but it has an application to questions which arose incidentally at the trial, and which have been earnestly and elaborately discussed by counsel in this court. We have, consequently, felt justified in referring thus generally to that subject and making some expression of opinion upon it.

A careful review of all that has been presented in derogation of the proceedings below has failed to disclose any sufficient reason for a reversal of the judgment. *Gibson v. Armstrong*, 7 B. Monroe, 481; *Bouldin v. Alexander*, 15 Wal. 131; *Kniskern v. Lutheran Churches*, 1 Sandf. Ch. 439; *Watson v. Garvin*, 54 Mo. 353; *Hale v. Everett*, 53 N. H. 9 (16 Am. R. 32); *Connitt v. Reformed P. D. Church*, 54 N. Y. 551; *Dutch Church v. Bradford*, 8 Cowen, 457; *Dieffendorf v. R. C. Church*, 20 Johns. 12; *Ferraria v. Vasconcellos*, 31 Ill. 25; *Brunnenmeyer v. Buhre*, 32 Ill. 183; *Happy v. Morton*, 38 Ill. 398; *Field v. Field*, 9 Wend. 394; *Gaff v. Greer*, 88 Ind. 122.

The judgment is affirmed, at the costs of the appellant, the cross complainant in the court below.

Flenner et al. v. The Travellers Insurance Company.

No. 10,147.

FLENNER ET AL. v. THE TRAVELLERS INSURANCE COMPANY.

DECEDENTS' ESTATES.—*Sale of Lands.*—*Widow.*—*Descent.*—See *Flenner v. Benson, ante*, p. 108.

SAME.—*Estopel.*—A court has no power, in selling the lands of an intestate, to make an order which will enable the purchaser to acquire more than the present estate of the heirs at law; nor can they be estopped by the order of sale from claiming an estate afterwards acquired.

From the Warren Circuit Court.

W. C. Wilson and J. H. Adams, for appellants.

F. H. Levering and J. M. Rabb, for appellee.

HAMMOND, J.—This case is in all respects, except as to the name of the appellee and the description of the land, the same as that of *Flenner v. Benson, ante*, p. 108. It will be seen by that case that the appellants are heirs, by his first wife, of David Flenner, deceased, who left surviving him Abigail Flenner, a fourth wife, by whom he had no children. The administrator of said David Flenner, for the purpose of paying debts due from his estate, in a proceeding in which the appellants and the widow were parties, by the judgment of the proper court, sold the decedent's real estate, subject to the life-estate of the widow. The purchaser at the administrator's sale afterwards became seized of her interest, or such as she could convey, by quitclaim deed. The appellee is the remote grantee of said purchaser and claims to own all the land in controversy in this action; and so the court below adjudged. The widow having died, the appellants, as her heirs, became the owners of one-third of the land. *Utterback v. Terhune*, 75 Ind. 363; *Armstrong v. Cavitt*, 78 Ind. 476; *Caywood v. Medsker*, 84 Ind 520; *Flenner v. Benson, supra*.

The appellee earnestly insists that the judgment of the court, ordering the sale of the land, subject to the life-estate of the widow, is conclusive and estops the appellants from asserting title. But it must be borne in mind that the court could order to be sold the interest only of the appellants

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which they held in the land at the time of the judgment, and that was the interest which they inherited from David Flenner. The sale by the administrator was without warranty as to title and conveyed such interest only as could have been conveyed by quitclaim deed by the parties to the proceeding had they been competent thus to convey. The administrator's sale and deed did not convey any after-acquired interest which the appellants may have obtained. The widow took one-third of the land free from the claims of creditors, and this the administrator could not sell. At her death her said interest descended to the appellants, and the judgment and administrator's sale can not estop them from claiming this title, acquired as it was by them subsequent to such judgment and sale. From the special findings of fact the appellants own one-third, and the appellees two-thirds of the land in controversy.

The judgment of the court below is reversed, at the appellee's costs, with instructions to render judgment on the special findings in accordance with this opinion.

No. 9872.

SIMONS v. GAYNOR.

NEGLIGENCE.—Street.—Reckless and careless riding or driving upon a public street, whereby another, without fault, is injured, is actionable.

SAME.—Street Crossing.—*Contributory Negligence.*—The fact that a footman crosses a street elsewhere than at the usual crossings is not *per se* contributory negligence which will defeat an action against another who injures him by recklessly riding or driving against him.

SAME.—Evidence.—Municipal ordinances regulating the speed of driving may be considered in determining whether the defendant was guilty of recklessness in driving against the plaintiff.

From the Huntington Circuit Court.

J. C. Branyan, C. W. Watkins, M. L. Spencer, J. B. Kenner
and *J. I. Dille*, for appellant.

— *Boyle and B. M. Cobb*, for appellee.

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ELLIOTT, J.—The appellee, while walking across one of the public streets of the city of Huntington, was struck and injured by a horse which the appellant was riding.

The fact that a footman undertakes to cross a street at a place other than the regular crossings for footmen will not, of itself, defeat an action for injuries caused by a horseman's negligently riding against him.

Footmen travelling the streets of a city are bound to exercise reasonable care, and if they are injured by reason of their omission to exercise such care, no action will lie. Whether reasonable care was exercised depends in a great measure upon the facts of the particular case, and no precise rule can be laid down. We can not in the present instance say that the jury did wrong in finding that the appellee was free from contributory negligence, and, therefore, will not disturb their verdict upon that ground.

Horsemen must exercise ordinary care to prevent injury to others in the lawful use of the street, and one who fails to exercise such care is liable in damages to a person, himself free from fault, who suffers injury from the want of care. Reckless and careless riding or driving on much travelled thoroughfares of a city constitutes actionable negligence. No one has a right to ride or drive upon a travelled public street at such a rapid rate of speed as will imperil the safety of others. *Williams v. Richards*, 3 Car. & K. 81. There was evidence in this case tending to prove that the appellant was riding carelessly and at a fast gait, and we can not say that the jury did wrong in inferring that there was culpable negligence on his part.

Ordinances of a municipal corporation may be taken into consideration in determining whether the speed of the horse at the time of a collision was excessive. One who rides or drives at a rate of speed greater than that prescribed by a statute or a municipal ordinance must expect that fact to be used as evidence against him. *Shear. & Redf. Neg.*, sec. 305; *Madison, etc., R. R. Co. v. Taffe*, 37 Ind. 361.

Judgment affirmed.

Astley v. Capron.

No. 10,082.

ASTLEY v. CAPRON.

EXECUTION.—Exemption.—Schedule and Affidavit.—In the absence of the execution defendant, the affidavit of his wife claiming exemption of property from execution under the act of 1861 (Acts 1861, p. 119), her affidavit for that purpose, verifying the schedule, showing that the schedule contains "a full and true account of all * * * property" of her husband "and held by him at the date of the issuing of the execution," is sufficient without the words "or in which he then had any interest."

SAME.—Statute Construed.—Statutes exempting property from execution are to be liberally and reasonably construed.

SAME.—Replevin.—Evidence.—Instruction.—Where a schedule and affidavit, made to claim property exempt from execution, showed some chattels sold after the execution issued, but did not account for the proceeds thereof, it is not error to instruct the jury in an action of replevin by the execution defendant against the sheriff, for the goods seized, that if it was shown by the evidence that the goods sold and not sold did not exceed \$300 in value, that would be a sufficient accounting for the proceeds of the goods sold.

SAME.—Evidence.—In replevin against the sheriff for goods levied on by execution, claimed as exempt, the schedule and affidavit made by the wife of an absent debtor and presented to the sheriff, with a demand for exemption pursuant to the statute, are admissible in evidence.

SAME.—Householder.—Housekeeper.—Statute Construed.—A householder, in the sense of the statute exempting property from execution, is not necessarily a housekeeper; it is sufficient if he be the head of a family to whose support he contributes.

RESIDENCE.—Presumption.—Where residence is shown in this State for a number of years, it will be presumed to continue unless the opposite party show that it has been lost; and it is not lost by going to another State and engaging in business there with the intention *ultimately* of residing there.

PRACTICE.—Interrogatories.—New Trial.—Error of the court in refusing to require specific answers to interrogatories sent to the jury is only available as a cause for a new trial.

SAME.—Supreme Court.—Where the record does not show that interrogatories have been sent to the jury in the manner contemplated by the statute, R. S. 1881, section 546, no question upon a refusal to require more specific answers thereto will be considered by the Supreme Court.

SAME.—Instructions.—An instruction to the jury which is correct as far as it goes; but not full enough, can not be questioned in the Supreme Court, unless the lower court has refused, on request, to give a fuller one on the subject.

89	167
196	390
89	167
135	498
89	167
146	594
89	167
149	515
89	167
153	691

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SAME.—*Evidence.*—If the plaintiff fail to prove some essential fact, and the defendant supplies the omission, it is sufficient.

SAME.—*Instruction.*—An instruction which assumes a fact which is conclusively shown by the evidence is not objectionable therefor.

From the Marshall Circuit Court.

J. S. Bender, H. Corbin, J. D. McLaren and — Parks,
for appellant.

M. A. O. Packard and A. C. Capron, for appellee.

BICKNELL, C. C.—The appellant, as sheriff of Marshall county, had taken certain personal property of the appellee, by virtue of an execution against him. This was an action of replevin to recover the property. The complaint averred that the plaintiff was a resident householder of Marshall county, and that when the goods were taken the plaintiff was temporarily absent from the State, but that his wife was residing at his house and claimed the goods as exempt from execution, and tendered to the defendant an inventory and schedule pursuant to the statute, together with her affidavit, and notified him of her choice of an appraiser, and demanded the property, and requested him to appoint an appraiser, but he refused to do so and refused to give up the property; that she then selected two appraisers and demanded of the defendant that said property to the amount of \$300 should be appraised and set off to the plaintiff; all of which the defendant refused, and unlawfully kept possession of the property, etc. The complaint demanded a return of the property and damages for its detention.

The complaint was verified by the affidavit of A. C. Capron, the plaintiff's attorney. Annexed to the complaint were a copy of the inventory and schedule, and a copy of the affidavit made by the plaintiff's wife, which was as follows:

“Lucy M. Capron, being duly sworn, upon her oath says that she is the wife of Adolphus B. Capron, who is a resident householder of Marshall county, in the State of Indiana; that said Adolphus B. Capron is temporarily absent from the State on business, and is not expected to return until about July,

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1879, and that she is herself a resident of said county, and she says, in behalf of herself and her said husband, that the above and foregoing list, inventory and schedule contain a full and true account of all the real estate within or without this State, rights, credits and choses in action, money on hand or on deposit within or without this State, and all personal property of every description whatever, belonging to said Adolphus B. Capron and held by him at the date of the issuing of the execution in this case, and that before she had notice that the same had been issued, she sold and delivered the following property, to wit: 1 lounge, 6 cane-seat chairs, 1 rocking-chair, 25 yards old carpet; the same being the items in the schedule marked 'B.' She therefore claims that \$300 worth of said personal property be set off to her for her said husband as exempt from sale on said execution."

An affidavit in replevin in the common form having been made by Albertus C. Capron, the plaintiff's attorney, a writ of replevin was issued, under which, the plaintiff having given bond, the property was delivered to the plaintiff, its aggregate value being \$277.

There was no demurrer to the complaint, but after a verdict for the plaintiff the defendant appealed, and assigned for error, with other causes, that the complaint did not state facts sufficient to constitute a cause of action, and that the court erred in overruling his motion in arrest of judgment. The sufficiency of the complaint, therefore, is the first question to be considered.

The only objection made to the complaint by the appellant in his brief is, that it fails to show that the property was exempt from execution, because the affidavit of the plaintiff's wife fails to contain the words "or in which he had any interest at the date of the issuing of the writ." The act of March 7th, 1857, 2 R. S. 1876, p. 352, provides that if an execution be issued against a man absent from home, his wife may exercise all the rights in relation thereto which would belong to him if he were present; and the act of 1861, 2 R.

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S. 1876, p. 352, provides that before any person shall have exemption he shall make an inventory, etc., "of all of his or her real estate, within or without this State, money on hand or on deposit within or without this State, rights, credits and choses in action, and all personal property of every description whatever belonging to him or in which he had any interest at the date of the issuing of the writ, and make and subscribe an affidavit to the same that such inventory contains a full and true account of all such property as required in this act to be set out in the said inventory, had or held by him at the time such writ was issued." And this act further provides that where the defendant is absent from the State, his wife "may make out the schedule required in this act, and verify the same by her affidavit, and the said schedule, when so made and delivered to the officer holding the writ, shall entitle the wife to claim and hold for her husband the amount of property which by law is exempt from execution."

The complaint in this case shows a schedule made of real and personal property, and the affidavit of the wife states that it contains "a full and true account of all the real estate within or without this State, money on hand or on deposit within or without this State, rights, credits and choses in action, and all personal property of every description whatever belonging to said Adolphus B. Capron and held by him at the date of the issuing of the execution in this case."

These statutes of exemption are reasonably and liberally construed. *Kelley v. McFadden*, 80 Ind. 536, 538. And such an affidavit by a wife, in the absence of her husband, is a substantial compliance with section 2 of the act of 1861, *supra*, which declares that the wife may, when her husband is absent from the State, make the schedule and verify the same by her affidavit.

We think the complaint was sufficient, and that there was no error in overruling the motion in arrest of judgment.

The defendant answered the complaint in a single paragraph, admitting that he, as sheriff, took the property by vir-

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tue of an execution as alleged in the complaint, and that the plaintiff at the time of the levy was absent from the State, but the answer averred that the plaintiff was not then a resident of the State, and that his wife had broken up house-keeping and was boxing and disposing of all said goods, intending to follow her husband; that the plaintiff was then in business as a lawyer at Leadville, in Colorado, and had disposed of all his business in Indiana, and had rented his house, which was mortgaged for its full value, and had dissolved and settled his partnership with his brother in Indiana, and that the plaintiff is now a resident of Leadville, Colorado, where his wife has gone to join him; that at the time of said levy, and at the time of said demand for exemption, and at the time this suit was brought, the plaintiff was not a resident householder and was not entitled to the possession of said property. The answer denied all the other allegations of the complaint and demanded a return of the property, etc.

The plaintiff replied in denial.

The issue was tried by a jury who returned the following verdict, interrogatories and answers:

"We, the jury, find for the plaintiff, that he is the owner of and entitled to the possession of the property described in the complaint; that the same was wrongfully detained by the defendant, and is of the value of \$250, and we assess the damages of the plaintiff for the wrongful detention at one cent.

"INTERROGATORIES.

"No. 2. At the time the property was demanded as exempt from execution, and at the commencement of this suit, was A. B. Capron the keeper of a house, and occupant of a house in the State of Indiana? Ans. Yes.

"No. 3. At the time the property was claimed as exempt from execution, and at the commencement of this suit, was A. B. Capron the master and chief of a house and family, keeping house with them, in the State of Indiana? Ans. A. B. Capron was master and chief of a house and family keeping house, but absent at the time.

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"No. 4. Was A. B. Capron, at the time of the issuing of the execution, and of the commencement of this suit, a resident of the State of Indiana? Ans. Yes.

"No. 5. When the plaintiff demanded of the sheriff to set off to him the property claimed in his complaint as exempt from execution, did he, or any one for him, accompany his demand with a schedule of all his property, rights, credits or choses in action, which he held or owned within or without this State, or which he had any interest in, and have attached to the same an affidavit that it contained a true, full and complete account of all such property, and show what property had been disposed of by him after the issuing of the writ of execution, and what disposition had been made of the proceeds? Ans. At the time the property was demanded by the sheriff, Mrs. A. B. Capron made a demand of 'set-off' which was refused at the time, and afterwards the schedule was presented to the sheriff, with affidavit attached, containing amount of all property disposed of after writ of execution, and the proceeds of all sales come to the hands of Mrs. A. B. Capron."

The record states that the defendant moved for an order that the jury retire and answer the interrogatories more specifically, which motion was overruled by the court. The defendant excepted and objected to the discharge of the jury without more specific answers to said interrogatories.

The second specification in the assignment of errors is as follows:

"2d. The court erred in overruling defendant's motion to remand the jury to their room and require said jury to answer more fully and specifically interrogatory No. 5, tendered to the court by the defendant, and submitted by the court to the jury to be answered in case of a general verdict."

The third specification in said assignment is:

"3d. The court erred in receiving the irresponsible and insufficient answer made by the jury to interrogatory No. 5, and thereupon discharging the jury over the defendant's objections."

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These are not proper assignments of error; they belong to the reasons for a new trial, and the foregoing action of the court in reference to interrogatory No. 5, and also the alleged action of the court in refusing to submit to the jury interrogatory No. 1, propounded by the defendant, are among the reasons assigned for a new trial. But the bill of exceptions states nothing as to either of these interrogatories, and all that the record contains as to the interrogatories is the following statement, inserted by the clerk immediately after the verdict and immediately preceding interrogatories Nos. 2, 3, 4 and 5, as returned by the jury with their answers thereto, to wit: "If the jury shall find a general verdict for the plaintiff, then the defendant requires the jury to answer the following questions."

In the *Cleveland, etc., R. W. Co. v. Bowen*, 70 Ind. 478, the record, after copying the general verdict, was continued thus: "And said jury also return into open court their answers to the interrogatories propounded by the defendant herein, in these words," and then the interrogatories were inserted in their proper order, according to their numbers. After reciting the statute, 2 R. S. 1876, p. 171, section 336, this court said: "We are of the opinion, that in cases like this, where it is claimed that special interrogatories have been submitted to, and answered by, the jury, the record ought, in some way, to show affirmatively that the interrogatories were submitted to the jury in the manner, and under the circumstances, contemplated by the statute. If the courts were authorized, at their discretion, to submit interrogatories upon mere questions of fact, in all cases, we might be justified in assuming, where interrogatories have been answered and returned into court, that they had been properly submitted to the jury; but, however that might be, we think a stricter rule ought to be observed, where the authority of the courts in that respect is limited and special. It is to our minds quite evident, that the record of a cause ought not to be encumbered by, nor the attention of this court required to, interrogatories which are not shown to have been considered by the court and properly

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sent to the jury." In the case just cited, as in the case at bar, there was nothing in the record to show that the interrogatories were ever in any manner considered by the court or by it submitted to the jury. The court further said: "Our conclusion is that those interrogatories are not in the record in such a way as to raise any question in this court upon them, or upon any of the answers to them." The case cited is exactly in point here, and it follows that no question arises here upon the said first and fifth interrogatories. The record does not show that there ever was any interrogatory No. 1, or any action of the court thereon.

Among the reasons assigned for a new trial as errors of law occurring at the trial were the giving to the jury instructions Nos. 3, 4, 5, 6 and 7, and the refusing to give the jury instructions Nos. 8 and 9, requested by the defendant.

That part of instruction No. 3, to which the appellant objects, is the following: "The affidavit attached to the inventory shows that certain articles therein named have been sold, but does not show what disposition was made of the proceeds, but the same articles are mentioned in the inventory and referred to by the affidavit as marked B, and evidence of the value of said articles has been given to the jury, and if the jury shall find from the evidence that the value of said articles, together with the value of the other property named in the inventory, does not exceed the sum of \$300, then that would be a sufficient accounting of the proceeds of the articles sold, to comply with the law in that respect." There was no error in this instruction.

Instruction No. 4 was as follows:

"It is unnecessary that I should give you any particular instructions in regard to value. The evidence is before you, and if, in your judgment, you can determine from it the value of the property to a reasonable certainty, it is sufficient. All you have to do is to say what that value is."

The objection made to this instruction is that it was not full enough, and was likely to mislead the jury; if it was not full

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enough, the defendant ought to have requested a fuller instruction. The court had already told the jury that the value of the property must be established to a reasonable certainty by a preponderance of the evidence. There was nothing in the fourth instruction that had any tendency to mislead.

The fifth instruction was the following: "As to the nature of the debt to satisfy which the property was taken, the plaintiff introduced no evidence; but the judgment upon which the execution was issued has been read in evidence, and that shows that it was founded upon a contract. This evidence was introduced by the defendant, it is true, but the plaintiff is entitled to the benefit of it, as if he had introduced it himself." We think there was no substantial error in this instruction.

That part of the sixth instruction to which the appellant objects is the following: "But the residence of the plaintiff having been shown to be in Indiana for a number of years before he went to Colorado, it will be presumed to have continued in Indiana until it is shown that he acquired a residence elsewhere. The burthen of proof is, therefore, on the defendant to show that the plaintiff had acquired a residence elsewhere than in Indiana, before the commencement of this suit."

The objection to this urged by the appellant is that it required the defendant to prove a negative, and assumed that the residence of the plaintiff had been shown to be in Indiana for a number of years. It was not disputed that the plaintiff's residence had been in Indiana for a number of years. The court had told the jury that the plaintiff could not recover without showing by a preponderance of evidence that he was a resident of Indiana when the demand for exemption was made and when this suit was commenced. The evidence showed conclusively that the plaintiff's residence had been in Indiana, and the only question was whether he had lost that residence. We think there was no substantial error in instruction No. 6.

The seventh instruction given by the court is as follows: "As to what constitutes a householder within the meaning of

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the statute, I instruct you that a householder is the father or head of a family whom he supports or assists in supporting. It is not necessary that the family should keep house in the ordinary sense of that term. The father, as head of a family, may put his family out to board and still be entitled to the benefit of the law. If the plaintiff, at the time of said demand for exemption, and after the bringing of this suit, was supporting his wife or aiding in her support, and was intending to continue to live with her and to return to Indiana to reside or remain permanently, or indefinitely, when his business in Colorado was terminated and finished, then he was a householder within the meaning of that term in the statute providing for the exemption of property from sale on execution." The objection made to this instruction is that "it is imperfect and ambiguous and not sufficiently clear and full as a definition of the term householder," and this is all that appellant presents in his brief as to this instruction.

We think there was no substantial error in this instruction; it was applicable to the evidence, and its propositions are supported by the authorities. *Norman v. Bellman*, 16 Ind. 156; *Mark v. State, ex rel.*, 15 Ind. 98; *Kelley v. McFadden*, 80 Ind. 536. In *Bunnell v. Hay*, 73 Ind. 452, this court said: "It was the duty of the appellant to support the child which was his by adoption, and the case, therefore, falls within the rule, sanctioned by many authorities, that he is to be deemed a householder upon whom rests the duty of supporting the members of his family or household. *Thompson Homesteads and Exemptions*, secs. 45-46; *Smyth Homestead and Exemptions*, sec. 532."

Instruction No. 8, requested by the defendant and refused by the court, was as follows:

"8. In order to constitute a person a householder to entitle him to the benefit of the exemption law, it is necessary that he be the occupier of a house, a housekeeper, master of a house or family, the master or chief of a family, one who keeps house with his family, and in this case, unless you shall

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find from the evidence that the plaintiff occupied, or stood in that relation as above defined, he is not entitled to the benefit conferred by the law upon resident householders, exempting property from sale on execution, and in such case you should find for the defendant."

There was no error in refusing this instruction. The claimant need not be at the time the actual occupier of a house. *Norman v. Bellman, supra.*

The ninth instruction requested by defendant, and refused by the court, is:

"9. In order to constitute a person a resident, etc., it is necessary that he should be a *bona fide* resident of this State. So, in this case, if you should find from the evidence that the plaintiff, at the time of making the claim for exemption, had left the State of Indiana and gone to Colorado, and had engaged in business there with the intention of ultimately making that his residence, or staying for an indefinite time, without any fixed intention of returning to Indiana, and afterwards, before making the claim for exemption, had sent for his family to come to him, and they had broken up housekeeping, and were selling off their household goods preparatory to going to Colorado to join the plaintiff, or if you shall find that he so went to Colorado without any definite intention of staying, but with the intention of staying if he liked it, and before making the claim for exemption in this case had engaged in business and sent for his family to remove there and join him, with the purpose of staying for an indefinite time, and after this, while his wife was selling off his household goods preparatory to leaving, made the claim for an exemption, he is not a resident householder in the sense of that term, and in such case you should find for the defendant." There was no error in refusing this instruction.

It ought not to have been given as prayed. An original domicile remains until it is abandoned or a new one is acquired: A man who has a domicile in Indiana does not lose

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it by going to Colorado and engaging in business there, nor by forming an intention that he will *ultimately* make that his residence; an intention to change residence at some future time is not a present change of residence. See *Culbertson v. Board, etc.*, 52 Ind. 361. This disposes of the objections in reference to the instructions.

Another reason alleged for a new trial is that the court erred in admitting in evidence the schedule and affidavit presented to the sheriff by the plaintiff's wife. There was no error in this. *Boesker v. Pickett*, 81 Ind. 554; *Kelley v. McFadden, supra*.

The remaining reasons alleged for a new trial are that the verdict was not sustained by sufficient evidence and was contrary to law. There was evidence tending to sustain the verdict; when that is the case this court will not disturb the verdict. *Frank v. Purkhiser*, 83 Ind. 496. The verdict was not contrary to law. There was no error in overruling the motion for a new trial. We have now considered all the errors properly assigned, and we find no substantial error in the record.

The judgment ought to be affirmed.

PER CURIAM.—It is therefore ordered, on the foregoing opinion, that the judgment of the court below be and it is hereby in all things affirmed, at the costs of the appellant.

No. 9727.

KOONS v. THE FIRST NATIONAL BANK OF JEFFERSONVILLE ET AL.

JUDGMENT.—*Finding.*—A finding of matters not in issue is not proper, and a judgment thereon adjudicating matters not in question is erroneous.

PLEDGE.—*National Bank Stock.*—*Certificate of Possession.*—The title to and ownership of stock in a national bank can only pass by a transfer of the stock on the books of the bank; hence the mere possession of a certificate of stock in a national bank is not such a possession as to constitute the holder a pledgee, but is at most a mere equity.

Koons v. The First National Bank of Jeffersonville *et al.*

From the Clark Circuit Court.

M. C. Hester, for appellant.

C. L. Jewett, for appellees.

MORRIS, C.—The appellant, who was the plaintiff below, brought this suit against the First National Bank of Jeffersonville, Emanuel Hawley, Hiram Mayberry and David S. Koons. He alleges in his complaint that on the — day of —, 1878, he was the owner of thirty-five shares of \$100 each of the capital stock of said bank, of the value of \$3,500, and that said stock then stood in his name on the books of said bank; that, being liable to said bank at the time, as the surety of the said David S. Koons, upon a promissory note for a certain sum, and desiring to transfer to said bank, or to such person as it should designate, sixteen and two-thirds shares of said stock, to be credited as a payment upon said note, he proposed to the officers of said bank, to wit, the president, cashier, and the said Hawley, acting as teller and clerk of the bank, to make said transfer of said sixteen and two-thirds shares of said stock and no more, which proposition was accepted by the bank and its officers; that said Hawley, who was then acting as teller and clerk of said bank and as clerk of its cashier, and who had charge of the book of said bank, upon which transfers of stock were then made, and to be made, produced to the plaintiff the said transfer book, and that he then directed and caused the said Hawley to fill up a blank certificate and bill of sale, on said book, for the sale, assignment and transfer by the appellant to a blank assignee, with permission to said bank and its officers to insert in such blank such name as they might desire, of the sixteen and two-thirds shares of said stock and no more; that the appellant thereupon signed said certificate, bill of sale and instrument of transfer so filled up. It is alleged that after the execution of said certificate and transfer the said bank caused said blank therein to be filled with the name of said Emanuel Hawley, of which the appellant does not complain; but he avers that

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after the execution of said instrument of transfer the said Hawley, who was still acting as the teller and clerk of said bank, and under the immediate direction and control of its cashier and other officers, and who had, as such teller, charge of the transfer book of said bank, wrongfully and fraudulently, and without the knowledge or consent of the appellant, altered and changed said certificate, bill of sale and instrument of said transfer, by inserting therein the figures "18 $\frac{1}{3}$," after and in addition to the figures "16 $\frac{2}{3}$," and the words "thirty-five," so as to make the said instrument convey and transfer to said Hawley as well the said eighteen and one-third shares of said stock as the first mentioned sixteen and two-third shares thereof, in all the whole of the said thirty-five shares of said stock so owned by the appellant; that said bank and its officers had full knowledge at the time of the fraudulent alteration of said certificate and transfer of stock; that, after said fraudulent alteration of said certificate and transfer, the said Hawley assigned and transferred the said fraudulent and forged certificate and transfer of said thirty-five shares of stock to the appellee Hiram Mayberry, who now claims to be the owner of the same, and is and has been, before the commencement of this suit, recognized by said bank as such owner; that the bank refuses to cancel said false certificate and transfer of said stock to said Hawley, although requested to do so by appellant, and refuses to treat or recognize him as the owner of said eighteen and one-third shares of said stock, or any part thereof; that said false transfer casts a cloud upon his title to said eighteen and one-third shares of said stock, and prevents him from selling the same. The prayer is that the appellant's title to said eighteen and one-third shares of stock be quieted, that said false certificate and transfer be corrected, and for general relief.

The appellee Mayberry appeared and filed a separate demurrer to the complaint, as did also the bank and the said Hawley.

The court overruled the demurrers of Mayberry and the

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bank, and sustained the demurrer of Hawley. The appellant declined to amend his complaint as to Hawley, and final judgment was rendered in his favor.

The appellee Mayberry answered the complaint by a general denial.

The First National Bank of Jeffersonville answered the complaint in two paragraphs, the first being the general denial.

The second paragraph states that on the 22d day of November, 1877, David S. Koons, the defendant below, was the owner of fifty shares of its capital stock, which fifty shares included the eighteen and one-third shares for which the appellant sues, and that, on that day, he deposited said stock with one Emanuel Hawley to protect him as surety on a note executed by said David S. Koons to this defendant, which note yet remains unpaid, in the sum of \$4,700; that, on the 22d day of November, 1877, the plaintiff, David S. Koons, said Hawley and this defendant agreed that David S. Koons should sell to the plaintiff for cash said eighteen and one-third shares of stock for the sum of \$1,833.33; which was, by the terms of said agreement, to be applied in payment of said note of said David S. Koons, secured by the said Hawley; that the plaintiff failed to pay said sum on said note, and that the said Hawley then required, and the plaintiff then did transfer said stock to said Hawley, that the same might be sold and applied on said note.

The plaintiff below replied in denial of said second paragraph of the answer of the bank.

The cause was by agreement of the parties submitted to the court for trial.

The court found generally for the appellant, but also found that at the time said eighteen and one-third shares of said stock were transferred to the appellant, Emanuel Hawley had possession of the certificate issued for said stock, and held the same in pledge to indemnify and save him from the payment of a note for \$4,144, held by said bank, and executed by the

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said David S. Koons as principal and the said Hawley as surety.

The appellant moved the court to correct its finding by striking therefrom so much thereof as found that said Hawley held the certificate for said stock in pledge for his indemnity and to save him from the payment of said note on which he was surety. The motion was overruled.

The appellant then moved for a new trial, which motion was overruled. Judgment was then rendered by the court to the effect that the appellant was the owner of said stock, subject to the rights of said Hawley, and that said bank should recognize him as such owner, subject to the rights of said Hawley as pledgee thereof, etc.

The appellant then moved the court to modify said judgment by striking therefrom so much thereof as related to the rights of said Hawley, on the ground that neither the facts found, upon which that part of the judgment rested, nor so much of said judgment as related to the rights of said Hawley, were within the issues in the case. This motion was also overruled.

The errors assigned question the rulings of the court upon the several motions made by the appellant. We think the court erred in overruling the appellant's motion to modify said judgment.

Hawley had demurred to the appellant's complaint, and his demurrer had been sustained and final judgment rendered in his favor. As to him the suit had terminated. He affirmed no right to the stock, and asked for no relief. His rights, if he had any, were not in issue; nor is there any thing in this record or proceeding to preclude him from asserting, at any time, any right he may have to, or any interest which he may have as pledgee or otherwise in, said stock. There was no issue in the case as between the appellant and Hawley; as between them there was nothing to try or determine.

Nor was the question put in issue by the bank. The ap-

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pellant claimed to be the owner of the stock, and, though Hawley held the same by delivery to him of the certificate, to indemnify and save him from liability on said note as the surety of David S. Koons, still the appellant would be the owner of the stock, and he would have the right to be so recognized by the bank. The right to vote the stock would be in him, not in the party having possession of the certificate of the stock. The title to and ownership of the stock could only pass by a transfer of the stock upon the books of the bank. *Weyer v. Second Nat. Bank of Franklin*, 57 Ind. 198. Whether the appellant owned the stock or not was the only issue between him and the bank. If the stock was in any way encumbered, if Hawley had an equitable lien upon it, in which the bank, as the creditor whose debt was intended to be secured by such lien, had an interest, it should have alleged such right and asked for relief. This it did not do. Whether there was any lien upon the stock in favor of Hawley was not a question within the issues in the case. It may not be improper to state that, upon the facts found by the court, Hawley did not hold the stock as pledgee. It is essential to a pledge that the pledgee should have possession of the thing pledged. The possession of the certificate for the stock neither gave Hawley the possession of the stock nor the right to its possession. A transfer of the stock upon the books of the bank could alone do this. *Wilson v. Little*, 2 N. Y. 443; *Brewster v. Hartley*, 37 Cal. 15; *Weyer v. Second Nat. Bank of Franklin*, *supra*. He had, upon the facts found, at most but a mere equity in the stock. If it was held as a personal indemnity merely, the bank could have no interest in it. *Osborn v. Noble*, 46 Miss. 449; *Van Orden v. Durham*, 35 Cal. 136; *Homer v. Savings Bank*, 7 Conn. 478.

It is insisted by the appellee the Bank, that the transfer of the eighteen and one-third shares of stock upon its transfer book, though unauthorized and fraudulent, and so found and adjudged by the court, may, in case of further transfers

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to innocent parties, involve it in additional trouble. Should this be so, it would not justify the court in this case in finding and adjudging matters not within the issues. If the bank may insist upon any equitable security which its principal debtor, David S. Koons, had given to Hawley as his surety for the debt, it may assert such right at any time. The judgment in this case is binding upon the parties only as to matters in issue. So, too, it may institute any proceedings which it may deem necessary to protect it against consequences arising from, or likely to grow out of, any improper or illegal use of any fraudulent transfers of its capital stock upon its books.

We think the court below should have modified the judgment as requested by the appellant.

PER CURIAM.—It is ordered, upon the foregoing opinion, that the judgment below be and it is hereby modified by striking therefrom so much thereof as adjudges that the appellant owns and holds said eighteen and one-third shares of said stock subject to the rights of said Emanuel Hawley as pledgee thereof or otherwise. And the court below is ordered to strike from and out of said judgment these words, occurring therein immediately after the word "quieted": "Subject, however, to the rights of said Hawley as such pledgee as aforesaid." And these words: "It is further adjudged by the court that the said stock is held in pledge by said Emanuel Hawley as security for his endorsement on the note for \$4,144, executed by D. S. Koons and E. Hawley; and that the said bank and all the officers thereof shall recognize the said transfer of said stock to the plaintiff by said David S. Koons, executed on the transfer books of said bank on the — day of —, 1879, subject only to the right of said Hawley as such pledgee."

The appellees are adjudged to pay the costs herein.

Howk, J., was absent.

Cooter et al. v. Baston et al.

No. 9931.

COOTER ET AL. v. BASTON ET AL.

PARTITION.—*Quieting Title.*—*New Trial as of Right.*—Complaint for partition, averring that C. was in possession without title, and as to him praying that title be quieted against a cloud which, by his possession and otherwise, it was alleged he creates. Finding and decree of partition and against C.

Held, that C. was entitled to a new trial as of right, under the statute, sec. 1064, R. S. 1881.

BILL OF EXCEPTIONS.—*Misprision.*—*Supreme Court.*—A bill of exceptions appeared by the record to have been signed and filed in January, 1881, nearly a year before the proceedings were had.

Held, that the date was clearly a misprision, which the Supreme Court would disregard and deem amended.

From the Monroe Circuit Court.

J. H. Louden and *R. W. Miers*, for appellants.

J. W. Buskirk and *H. C. Duncan*, for appellees.

ELLIOTT, J.—The appellees' complaint alleges that they and the appellants, other than Marion Cooter, are the owners of certain described real estate, and sets forth the shares of each of the parties; avers that Marion Cooter has, without right, held possession thereof, "and, by reason of his possession and other means, has cast a cloud over plaintiffs' and defendants' title, and that they are entitled to their proportionate share of the same." The prayer is that partition may be made and the title quieted.

In setting out the shares alleged to be owned by the parties respectively, Cooter's name is not mentioned, and others are shown to be the owners, thus impliedly affirming that Cooter, although a party, has no interest in the land. In the decree it is recited, "that the court finds for the plaintiffs, and that they and the defendants, other than Cooter, are the owners in fee, and are entitled to possession; and it is adjudged that partition be made, and that said Marion Cooter has no interest in said real estate; that the title thereto should be quieted in the plaintiffs and defendants, other than Marion Cooter."

89	185
135	185
197	499
89	185
128	285
199	281
89	185
132	64
89	185
140	412
89	185
153	653
89	185
165	287

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This decree was entered on the 10th day of December, 1881, and at the same term, on the 17th day of the same month, the appellant Cooter filed his motion, accompanied by the proper undertaking, for a new trial as a matter of right. The motion was denied and an exception reserved.

Ordinarily, proceedings in partition do not involve questions of title, but simply divide into shares land owned by tenants in common. It is, however, established by a long line of decisions that title may be put in issue, and when put in issue and adjudicated the judgment is conclusive. *Miller v. Noble*, 86 Ind. 527, and authorities cited. The complaint denies all title in the appellant Cooter, and as to him certainly puts the title in issue. This we say because it is alleged that the whole title is in parties other than Cooter, and that his possession without right casts a cloud on the title of those who are alleged to be the rightful owners. The prayer of the complaint shows that more than partition was sought, and in such a case as this reference may be properly made to the prayer, for the purpose of determining the character of the action. *Physio-Medical College v. Wilkinson*, *ante*, p. 23.

Not only was the title put in issue, but there was an express and full adjudication upon this issue. It is quite plain that the judgment decreeing that the title of the appellees be quieted, and that the appellant Cooter is not entitled to claim any interest in the land, is an adjudication settling the title to real estate. *Physio-Medical College v. Wilkinson*, *supra*; *Green v. Glynn*, 71 Ind. 336; *Ulrich v. Drischell*, 88 Ind. 354; *Adams v. Wilson*, 60 Ind. 560. We have no doubt that the case disclosed by the record is one entitling the appellant to a new trial as a matter of right.

It is said that we ought not to regard the bill of exceptions, because it appears to have been signed and filed in January, 1881, nearly a year before the proceedings were had. The record very clearly and fully shows that the error in the date is a mere clerical misprision, and as such errors may be

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amended below they are deemed amended here. There can be no doubt that the January intended was that of the year 1882, and not that of the preceding year.

Judgment reversed, with instructions to grant appellants' motion for a new trial as a matter of right.

No. 10,541.

McDERMOTT v. THE STATE.

CRIMINAL LAW.—Continuance.—Witness.—Diligence.—An affidavit by a defendant for a continuance on account of the absence of a material witness resident of another State, but so near that his deposition might have been taken, which shows no reason for omitting to take the deposition, save that the defendant was in jail, fails to show due diligence.

SAME.—A continuance applied for on account of the absence of witnesses who appear personally in court should be refused.

SAME.—Murder.—Use of Weapon.—Intention.—Presumption.—Where a homicide is caused by the intentional use of a deadly weapon in a manner likely to kill, a malicious intention to kill is a legal presumption, unless it occurred in self-defence, or on a sudden heat caused by such provocation as by law reduces the killing to manslaughter.

SAME.—Self-Defence.—A homicide purposely committed is not excusable on the ground of self-defence, unless the accused reasonably believed it necessary to save his own life, or avoid great bodily harm; but one may reasonably defend himself when assaulted, and if thereby the assailant be unintentionally killed, without a belief that the killing is necessary, the homicide is excusable.

INSTRUCTIONS.—Instructions to the jury must be considered as a whole, and will not be deemed erroneous because, if viewed in separate parts, such parts may be incorrect. For examples, see opinion.

SAME.—Witness.—Impeachment.—Jury.—Credibility.—An instruction, which tells the jury how witnesses may be impeached, and that it does not follow that an impeached witness is to be wholly disbelieved, that the jury are to judge of the weight due to such witnesses after considering how far they have been corroborated, does not assume that any witness has been impeached, nor is it otherwise erroneous.

From the Floyd Circuit Court.

89	187
124	56
135	314
136	669
89	187
140	807
140	963
141	25
89	187
144	255
145	569
147	33
89	187
149	406
152	38
89	187
153	379
153	564
89	187
154	4
155	272
89	187
158	697
89	187
163	507

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J. V. Kelso, J. G. Howard, J. F. Read, M. Z. Stanard and J. K. Marsh, for appellant.

F. T. Hord, Attorney General, *F. B. Burke*, Prosecuting Attorney, and *G. W. Friedley*, for the State.

ZOLLARS, J.—The questions discussed by counsel for appellant, and the grounds upon which a reversal of the judgment is asked, are the alleged errors of the court below in overruling appellant's motion for a continuance, the giving of instructions numbered 7, 9, 12, 14, 16 and 18, and the refusal to give nine instructions asked by appellant. These alleged errors are presented by the record, and will be considered in their order.

Appellant was arrested on the evening of the 3d of October, 1881. On the 12th of the same month an indictment was returned by the grand jury of Clark county, charging appellant with murder in the first degree. On the 14th day of the same month, on application of appellant, the venue was changed to the Floyd Circuit Court. When this order was made the witnesses for the State were required to appear in the Floyd Circuit Court on the 29th day of November, 1881, to testify in the cause on behalf of the State. The transcript was filed in the office of the clerk of the Floyd Circuit Court on the 7th day of November, 1881. The case being called for trial in that court on the 29th day of November, appellant moved for a continuance on account of the absence of certain named witnesses. The court granted time until the hour of meeting on the following morning, for appellant to prepare and file his affidavit in support of his motion for a continuance, and notified him that if the attendance of any of the absent witnesses could be procured at the time given for the filing of the affidavit, the previous absence of such witness or witnesses would not be considered as sufficient cause for a continuance, so far as such cause might be based upon the prior absence of any witness or witnesses who might be present at the time of the filing of the affidavit.

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At the time fixed appellant filed his affidavit, based upon the absence of Mat Stephenson, William McCombs, George F. Howard and Eugene Dibble. The two latter named witnesses being present in court, the motion for a continuance was overruled, and appellant excepted.

His counsel now insist that the court below should have passed upon the motion for a continuance without reference to the fact that two of the witnesses named in the affidavit were present in court.

In this we do not agree with counsel. To continue a cause to procure the attendance of witnesses already in court, is not required by law or reason. Mat Stephenson and William McCombs, two of the witnesses named in the affidavit, are not thus shown by the record to have been present. A Mat Stephenson testified upon the trial as a witness for appellant, but whether or not she was the Mat Stephenson named in the affidavit we can not tell from the record; but, conceding that she was not, and that appellant was deprived of the testimony of the two witnesses not shown to have been present, did the court below err in overruling the motion for a continuance? It appears from the testimony that on the evening of his arrest appellant was in company with one Duffy, John Keefe and three or four others, in a saloon in Jeffersonville. A dispute arose among them which continued while they were in the saloon, and after they left, and resulted in appellant being knocked down and kicked and beaten by Duffy. Whether Keefe participated in the fight is a fact about which there is a conflict in the testimony. During the melee appellant used a pocket-knife as a weapon, wounding one of the party slightly and cutting Keefe in the neck, by reason of which he died in a short time. Appellant claims that the whole party were arrayed against him, and that by the absent witnesses he could have proven such facts as would have shown that in all he did he was acting in self-defence. There is no dispute about the materiality of the testimony of the absent witnesses.

It is contended on the part of the State that the court ruled

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correctly in denying the continuance, for the reason that appellant did not exercise diligence in procuring the attendance of the witnesses, or in taking their depositions. The excuse offered by appellant in his affidavit is that he was confined in jail from the 3d day of October until the case was called for trial; that he first learned of what the non-resident witnesses would testify to on the 20th day of November, and on the next day caused a subpoena to be issued for said witnesses, which was placed in the hands of the sheriff of Clark county. The subpoena, with the return of the sheriff thereon, is referred to and made a part of the affidavit for continuance. This subpoena contains the names of the two absent witnesses. The return shows that on the 28th day of November it was served upon McCombs and other witnesses, and that Mat Stephenson was not found.

It is stated in the affidavit that the said Mat Stephenson and William McCombs reside in the city of Louisville, in the State of Kentucky. It is not stated when said witnesses became residents of Louisville, or whether or not they ever were residents of Clark county, or of the State of Indiana. Nor is it stated when appellant learned that they were non-residents of this State, or whether or not he knew this fact at the time the subpoena was issued. For aught that appears in the affidavit, he had knowledge of that fact from the time when he first learned that they were important witnesses. We can not assume that appellant did not know of the non-residence of the witnesses, without a showing upon his part. Keeping in view the fact that if appellant had been ignorant of such non-residence he could easily have shown it in his affidavit, and that the court below must necessarily be allowed to exercise some discretion in granting or refusing a continuance, we think that, for the purpose of this decision, it should be presumed that appellant had knowledge of the non-residence of the witnesses from the time he learned of the materiality and importance of their testimony. To entitle a party to a continuance on account of absent witnesses, it must be shown that he

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has exercised due diligence. Sec. 1781, R. S. 1881; *Miller v. State*, 42 Ind. 544; *Ward v. Colyhan*, 30 Ind. 395; *Leary v. Nave*, 66 Ind. 220; *McKinlay v. Shank*, 24 Ind. 258; *State v. Norman*, 16 Ind. 192. The case of *Ward v. Colyhan, supra*, was tried in Vigo county. When the case was called for trial one of the parties applied for a continuance, on account of a witness temporarily in Evansville. In passing upon the refusal of a continuance by the court below this court said: "The defendant was aware of the importance of the witness for four or five days, ample time to have sent to Evansville for him, had he been absent the entire week, by the ordinary mode of travel. This court is bound to know that a few hours would have taken a messenger from Terre Haute to Evansville." In the case of *Leary v. Nave, supra*, an application was made in the Marion Circuit Court for a continuance, on account of the absence of a witness, then in Lafayette. The case was called for trial on the 24th day of February, having been previously set down for trial on the 20th of the same month. It is stated in the affidavit for a continuance that the party asking the delay had caused a subpoena to be issued on the 20th, which was returned not found. In speaking of the affidavit this court said: "The affidavit lacks certainty and precision; and we think it fatally defective in failing to state that the affiant was ignorant of the fact that the desired witness was in Lafayette, and of the length of time he had been there, etc. If he was not so ignorant, he might have procured the attendance of the witness or his deposition."

In the case in hearing, no excuse is offered for the neglect to take the depositions of the absent witnesses, except that appellant was confined in jail. This we think is not sufficient. Such an excuse may be offered in all cases of this character, and, if sufficient of itself, might postpone the trial of the cause indefinitely. Appellant, from the day of his arraignment, on the 14th day of October, if not before, up to the day the case was called for trial, had attorneys in his service, competent to assist him. From the time he learned of

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the materiality of the testimony of the witnesses the court was in session in Floyd county. An order for the taking of the depositions of the absent witnesses could have been gotten at any time. Louisville being within a short distance and of easy access, the depositions could have been taken within a short time. We think that appellant did not exercise due diligence in procuring the testimony ; that no sufficient excuse is offered for the lack of such diligence, and that the court below did not err in overruling the motion for a continuance. The case was tried by a jury, appellant was found guilty of murder in the first degree, and imprisonment for life fixed as the punishment. The only other grounds for a new trial urged in argument are alleged errors in giving and refusing instructions.

After having properly instructed the jury as to what constitutes murder in the first and second degrees, and voluntary and involuntary manslaughter, the court gave the seventh instruction, as follows :

“ To constitute either degree of murder there must be a malicious intention to kill. If the killing was done maliciously and purposely, it does not necessarily follow that it was done with premeditation. Premeditation implies that the slayer had time and opportunity for deliberate thought ; that after his mind conceived the thought of taking the life he meditated upon it and formed a deliberate determination to do the act ; but there need be no appreciable space between the formation of the intention to kill and the killing. The formation of the intention to kill and the killing may be instantaneous, as successive thoughts. After such a determination is so formed, and then carried into execution, no matter how soon thereafter, it is murder in the first degree ; otherwise it is not, and it is for the State to show that there was such premeditation beyond a reasonable doubt.”

It is insisted that this instruction was calculated to mislead the jury, for the reason that in the latter part of it, in the

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statements in relation to premeditation, the element of malice is dropped out, and the jury might and would understand therefrom that a determination to kill, carried into execution, would be murder in the first degree, although such determination may not have been malicious.

The instruction should not be thus dissected and separated. It must be considered as a whole. If an instruction may be thus separated into fractional parts, so that one portion may not limit and qualify, or extend and explain another portion, it will be difficult, if not impossible, to form an instruction that will stand such an examination and criticism. In thus separating into parts, the sense may be twisted and tortured so that the most correct may appear to be the most faulty instruction. We think that, taking the instruction under consideration as a whole, it states plainly that to constitute murder in the first degree the intention or determination to kill must be malicious.

In their objections to the ninth instruction given by the court, counsel again separate it into parts, and base their objections upon the definition of malice as contained in the first portion of the instruction. Taken as a whole, we think the instruction states the law correctly. The definition of malice is, substantially, that adopted in the case of *Coghill v. State*, 37 Ind. 111, 114. See *Moore's Crim. Law*, section 839.

Objection is also made to the latter portion of the twelfth instruction given by the court. This portion is a literal copy of an instruction held good in the case of *Jarrell v. State*, 58 Ind. 293.

The fourteenth instruction given by the court is as follows:

"Where a homicide is perpetrated by an intentional use of a deadly weapon, in such manner as is likely to and actually does produce death, the law presumes such homicide was committed purposely and maliciously, unless it was done in self-defence or in a sudden heat, caused by such provocation as by law reduces the killing to the grade of manslaughter."

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We think appellant can not complain of this instruction. If he did the killing in self-defence, as he claims, or if he did it in the heat of passion, under provocation, malice is not imputed to him under this instruction, and he might have been convicted of manslaughter or acquitted, had the evidence justified either.

The substance of the sixteenth instruction complained of is that it is not every assault and battery made upon a person that will justify or excuse him in taking the life of the assailant, but he may purposely do so if the character of the assault is such as to reasonably cause him to believe, and he does believe, that it is necessary to save his own life, or protect himself from great bodily harm; that if appellant was assaulted by the deceased in such a manner as to cause him to reasonably believe, and he did believe, that he was in imminent danger of losing his life, or suffering great bodily harm at the hands of the assailant, unless he slew him, and that while so believing he struck the fatal blow, the jury should acquit.

It is argued that it was not required that appellant should have believed it necessary to slay the assailant, in order to excuse him in so doing.

Counsel seem to overlook the fact that in this instruction the court is treating of the killing of the assailant *purposely*. Surely, it can not be said that a party may purposely take the life of another under the pretence of self-defence when he had no reason to believe, and did not believe, it necessary to save his own life, or to save himself from great bodily harm. An assaulted party may repel force with force, but the force used must be reasonable, and must at least be used, under the belief that it is necessary. Shall it be said that if A. assault B. with a riding-whip, B. may purposely take his life, not believing it necessary to save his own life, or to save himself from great bodily harm? When a party in his defence purposely goes beyond what is reasonably necessary, and beyond what he believes to be necessary, he ceases to act in self-defence, and

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becomes an aggressor; and if, under such circumstances, he purposely takes the life of the assailant, he is guilty of murder. The following language, from Mr. Bishop's work on Criminal Law, has been quoted and approved in several decisions by this court: "This right of self-defence is commonly stated in the American cases thus: If the person assaulted, being himself without fault, reasonably apprehends death or great bodily harm to himself, unless he kills the assailant, the killing is justifiable." 1 Bishop Crim. Law, 865; *Presser v. State*, 77 Ind. 274, and authorities cited.

If the latter portion of the instruction should be considered without reference to the word purposely, used in the former part, yet the objection urged by counsel would not be well taken for the reason that this latter part does not require that appellant should have believed it necessary to take the life of the assailant. It is stated simply that if he did so believe with reason, etc., the killing was excusable.

In all cases where the killing of the assailant is purposely done by the assaulted party, he must have acted under the belief that such killing was necessary to preserve his own life, or to save himself from great bodily harm, to render the killing excusable. We do not mean to say, however, that to render the killing excusable the assaulted party must have acted under the belief that the death of the assailant was necessary. As we have said, in proper cases the assaulted party has the right to meet force with force; and if, in a proper defence, death results to the assailant, the killing may be excusable without a belief on the part of the assaulted party that it was necessary for his own safety. In such cases the defence is purposely made, but the killing is not purposely done. It is simply the result of the defence. *Runyan v. State*, 57 Ind. 80 (26 Am. R. 52); Whart. Crim. Law, sec. 1019; Hor. & Thomp. Cases on Self-Defence, 492.

In the seventeenth instruction the court charged the jury as follows: "It is not necessary that the defendant should

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have believed it necessary to take the life of the assailant in order to reasonably defend himself, but it is sufficient to excuse the defendant if the death of his assailant resulted from the defendant's reasonable defence of himself."

These instructions, whether considered separately or together, are as favorable to appellant as he had a right to ask.

In the eighteenth instruction given by the court, and of which complaint is made, the jury were instructed of the various modes of impeaching witnesses, and told that it does not follow that, because a witness may be impeached, his testimony shall be entirely excluded from consideration; that in such case it is for the jury to decide for themselves what weight shall be given to the testimony of such witnesses, taking into consideration all corroborating circumstances and testimony, if any exist. It is objected that in this instruction it is assumed that witnesses have been impeached, and that it withdraws from the jury the right to give full credence to the testimony of such witnesses. We do not think that the instruction is open to the objections urged against it.

A number of instructions were asked by appellant which the court refused to give. We have examined each of them carefully, and think there was no error in their refusal. With the exception of perhaps two, which are unimportant to appellant, because not applicable to the case, the substance of the instructions so asked is embraced in those given by the court.

We have now gone over all of the supposed errors pointed out by appellant's counsel in their brief, and have given to each such a careful examination as the importance of the case demands. After such an examination we think there is no available error in the record, and that the judgment should be affirmed. The judgment is, therefore, affirmed.

Norton et al. v. Milner, Treasurer, et al.

No. 10,343.

NORTON ET AL. v. MILNER, TREASURER, ET AL.

RAILROAD.—Tax.—Public Aid.—Donation.—Forfeiture.—Parties.—Injunction.—Suit by taxpayers to restrain the collection of taxes voted in September, 1878, by a township in aid of a railroad, and levied by the county board in 1881. All the proceedings prior to the levy of the taxes were regular. In 1879 one-half the sum voted was levied and placed on the duplicate, and the other half in 1881, the road being then permanently located, constructed and in operation through the township and a sum expended therein greater than the aid voted.

Held, that by virtue of section 4094, R. S. 1881, the railroad company was entitled to the money, and the injunction would not lie.

Held, also, that a taxpayer of the township, upon his application, showing that the treasurer and other defendants had refused to permit defence save in the circuit court, was properly admitted by the court to defend.

From the Grant Circuit Court.

A. T. Wright and J. L. Custer, for appellants.

A. Steele and R. T. St. John, for appellees.

BICKNELL, C. C.—The appellants, taxpayers and citizens of Centre township, in Grant county, brought this suit against the county treasurer and Centre township, of said county, to restrain by perpetual injunction the collection of a tax levied by the county board upon all the taxable property in said township, in aid of a railroad company. Over the objection of the appellants, David B. Sweetser, upon his petition, was made a co-defendant. Centre township was defaulted.

The county treasurer and David B. Sweetser filed separate demurrers to the complaint, for want of facts sufficient. The demurrers were sustained and the plaintiffs appealed.

The appellees moved to dismiss the appeal, alleging that the assignment of errors does not contain the full names of all the parties.

Since this motion was made the assignment of errors has been amended by adding the full name of David B. Sweetser, the omitted party.

The appellants assign as errors the admission of David B.

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Sweetser as a party defendant, and the sustaining of the demurrers to the complaint.

There was no error in admitting Sweetser to defend; his petition was duly verified, and stated that he was a resident citizen and taxpayer of Centre township, and that the other defendants had declined to permit any appearance in the cause for them further than to contest the same in the circuit court. *Bittinger v. Bell*, 65 Ind. 445, 455.

The question presented by the demurrers is, had the county board a right, under existing statutes, to levy the tax in controversy at their June term, 1881?

Section 12 of the act of May 12th, 1869, Acts 1869, p. 92, R. S. 1881, section 4056, is as follows:

"If a majority of the votes cast shall be in favor of such railroad appropriation, the board of county commissioners, at its ensuing regular June session, shall grant the prayer of said petition, and shall levy a special tax of at least one-half the amount specified in said petition, but not exceeding one per centum upon the real and personal property in the county or township, as the case may be, liable to taxation for State and county purposes; which tax shall be collected in all respects as other taxes are collected for State and county purposes. And if the sum so levied shall not be equal to the amount specified in said petition, then the residue thereof shall be levied by said board of county commissioners at the June session of the following year."

The complaint shows that after regular proceedings authorizing aid to the extent of \$32,000, the county board, at its June term, 1879, ordered that the sum of \$16,000 be levied and collected, etc., and that the same be placed on the duplicate of 1879, "said \$16,000 being one-half of aid so voted."

The complaint avers that no other proceedings were had by said county board upon said appropriation until June 14th, 1881, at the regular June term, 1881, when said board made an order finding that said railroad had been permanently located and put in operation through said township, and that

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work had been done thereon exceeding in value said sum of \$32,000, and ordering that \$16,000 be levied and collected, etc., and placed on the duplicate of 1881, "said \$16,000 being one-half of the aid so voted, one-half of said aid having been ordered for the year 1880."

The complaint avers that the county auditor, under this last order, had placed on the duplicate of 1881 against each of the plaintiffs his share of said \$16,000, and had put said duplicate in the hands of the defendant, the county treasurer, who is threatening to collect the same, etc.

It will be observed that although the order of 1881 states that one-half of said aid had been ordered for the year 1880, yet, in fact, there was no order for 1880, the first order was in 1879, and for that year; no objection is made to said first order; there was no other order until 1881.

By section 12 of the act of May 12th, 1869, *supra*, the county board was authorized and required to levy one-half the amount specified in the petition at their June session, in 1879. This they did. They were also required to levy the residue "at the June session, in the following year." This they did not; they waited two years instead of one, and then, in 1881, they levied the residue.

They might have levied the whole appropriation in 1879, and directed that only half of it should be placed on the duplicate of the current year. *Bittinger v. Bell*, *supra*. Their order of 1879, directing a levy of one-half the amount voted, was valid. *Mustard v. Hoppess*, 69 Ind. 324.

The act of January 30th, 1873, Acts 1873, p. 184, provides in its 1st section, which is the same as R. S. 1881, section 4068, that such taxes shall not be placed on the duplicate until the railroad shall be permanently located, etc. This provision does not affect the levy of the tax; it concerns only the making of the duplicate, which is a distinct duty from that of making the levy. *State, ex rel., v. Wheadon*, 39 Ind. 520.

Section 2 of this act of 1873 provides that, although such a tax has been placed on the duplicate, its collection shall be

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suspended until an amount has been expended on the railroad equal to the amount of the tax. This provision also affects the duplicate only and not the levy.

The said section 2 of the act of 1873 was amended by section 2 of the act of March 11th, 1875, Acts 1875, p. 121, which is the same as section 4069, R. S. 1881. This amendment extended the time allowed to railroads to do their work from three years to five years, and provided that where such a tax has been placed on the duplicate, and its collection has been suspended, the county board, in certain cases, where the work done on the road in the township has been equal to the donation, shall order the tax collected as if it had never been suspended ; it gave no new power to make a levy.

The act of May 12th, 1869, *supra*, was further amended by the act of March 17th, 1875, Acts 1875, Spec. Sess., p. 70, but this amendment did not touch section 12 of the act of 1869 ; it left unchanged the power of the county board as to levy ; it changed sections 1, 2, 3, 4, 8, 13 and 17 of the act of 1869, and confined the right to aid railroads by donation to townships only.

The act of March 8th, 1879, Acts 1879, p. 46, R. S. 1881, sections 4058, 4064, has reference to the conditions to be specified in the petition, and requires the county board to make a contract with the railroad company stipulating for the performance of such conditions.

None of the foregoing legislation made any change in section 12 of the act of 1879, *supra*, as to the power of the county board to make a levy.

An act approved March 7th, 1877, R. S. 1881, section 4094, provides that "Any railroad company now organized under the laws of the State of Indiana, to which any township has made or may hereafter make an appropriation of money, to aid such company in constructing a railroad in or through such township, by taking stock in or donating money to such company, shall have five years from the passage of this act in which to complete such railroad for use, and, when so completed, such company shall be entitled to such appropriation."

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In the case at bar the order for the second levy was made in 1881, less than five years after the passage of the last mentioned act. That order contained the following:

"The board further finds that said railroad has been permanently located through said township; that the same has been fully constructed and the iron rails laid thereon, and that a train of cars and locomotives have passed over the entire length of said road through said township, and that an amount of work has been done and paid for in said township exceeding in value the said sum of \$32,000, the amount so voted, and that said railroad company is entitled to receive said moneys."

This finding shows conclusively that the facts existed, which, under the said act of March 7th, 1877, gave the railroad company the right to receive the remainder of the appropriation. *Board, etc., v. Hall*, 70 Ind. 469.

If the company, under the act of 1877, had the right to receive the money, it became the duty of the county board, at its June session, to make the levy and order the tax placed on the duplicate.

The tax was voted by the township on September 9th, 1878. The first levy of one-half was made in June, 1879; the second levy was made in June, 1881; it is not necessary to determine whether this was too late under the act of May 12th, 1869, *supra*, because, in the mean time, the railroad had been completed for use through the township, and work thereon had been done in the township and paid for to an amount exceeding the \$32,000 voted. This, under the act of March 7th, 1877, *supra*, entitled the railroad to the remainder of the appropriation, and the levy thereof by the county board was, under this act, undoubtedly valid. There was, therefore, no error in sustaining the demurrers to the complaint.

The judgment ought to be affirmed.

PER CURIAM.—It is therefore ordered, on the foregoing opinion, that the judgment of the court below be and it is hereby in all things affirmed, at the costs of the appellants.

Talkington v. Parish et al.

No. 10,370.

TALKINGTON v. PARISH ET AL.

DEMURRER TO EVIDENCE.—Inferences.—Presumption.—A demurrer to evidence admits every fact which the evidence tends to prove, and all reasonable inferences from them, but forced and violent inferences are not admitted.

SAME.—Fraudulent Conveyance.—Husband and Wife.—In an action against a husband and wife to set aside an alleged fraudulent conveyance, the evidence showed that the plaintiff had recovered a judgment against the husband for \$750, who did not then have, nor has he since had, any property subject to execution; that since the judgment the wife has purchased real estate worth \$5,000; that the estate of the wife's father amounted to \$733.33, of which her distributive share was \$104.76. The wife testified that she "had never inherited or received any property by gift or bequest, aside from her father's estate."

Held, that the evidence, upon a demurrer thereto, was insufficient to entitle the plaintiff to have the conveyance to the wife declared fraudulent.

From the Clinton Circuit Court.

J. N. Sims, for appellant.

J. C. Suit, A. E. Paige and S. O. Bayless, for appellees.

ELLIOTT, J.—The appellant gave evidence showing that on the 27th day of January, 1877, she recovered judgment against the appellee Theodore C. Parish for \$750; that he had then no property subject to execution, nor did he have at the time this action was commenced; that on the 6th day of March, 1880, Deborah Burgess executed to the appellee Nancy J. Parish, wife of Theodore, a deed for certain real estate, and that the estate of Nancy's father amounted to \$733.33, of which her distributive share amounted to \$104.76; and the appellee last named, when called as a witness by the appellant, testified "that she had never inherited or received any property by gift or bequest, aside from her father's estate." No evidence was offered showing that Nancy had any notice of her husband's indebtedness, nor was there any evidence that she did not pay the consideration for the property conveyed to her, unless the statement we have quoted from her testimony can be said to supply such evidence. The appellees

Talkington *v.* Parish *et al.*

demurred to the evidence, and their demurrer was sustained. The question for decision is, does the evidence entitle the appellant to have the conveyance to Nancy J. Parish declared fraudulent?

It is true, as appellant claims, that a demurrer to evidence admits all facts which the evidence tends to prove, and all reasonable inferences which may be drawn from them; but it is also true that forced and violent inferences are not admitted. *Willcuts v. Northwestern, etc., Co.*, 81 Ind. 300; *Pawling v. U.S.*, 4 Cranch, 219. We think it would be an unreasonable and violent inference to conclude that Nancy J. Parish was a mere volunteer. The only evidence which bears in the remotest degree upon this point is the statement made by Nancy in her testimony quoted above, and we can not infer from this that she did not get money from other sources than her father's estate, or in other ways than by gift or devise.

Appellant's counsel is in error in supposing that the only possible way in which a married woman can acquire money is by gift, devise or descent. There were other methods by which she might have acquired property after marriage, and in the present case there is no evidence tending to show that she might not have earned money or acquired property previous to her marriage. For anything that appears she may have been in the possession of large sums of money, or have been the owner of much property before she became the wife of her co-appellee. Her husband, at least while solvent, might have given his wife her own earnings. *Farman v. Chamberlain*, 74 Ind. 82.

The appellant assumed, by his action, the burden of showing fraud, and in order to do this it was necessary for him to overcome the presumption of good faith which existed in favor of his adversaries. Upon this presumption they had a right to stand, and, if it was not overborne by evidence, they had a right to insist that no case was made against them. We are unable to find anything which justifies the appellant in affirming that this presumption was broken down.

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We have several similar cases in our reports where demurrers were held to have been properly sustained to the evidence. In some of them the evidence for the plaintiff was decidedly stronger than in the present case. *Egan v. Downing*, 55 Ind. 65; *Pinnell v. Stringer*, 59 Ind. 555.

Judgment affirmed.

Opinion filed at the November term, 1882.

Petition for a rehearing overruled at the May term, 1883.

No. 11,013.

THE STATE *v.* WINGO.

89	204
155	291
155	559
89	204
157	580

CRIMINAL LAW.—Embezzlement.—Larceny.—Statute Construed.—Master and Servant.—Conversion.—Whatever would be embezzlement under the act of 1879 (Acts 1879, p. 126) would not be larceny, though it might have been larceny before the passage of that act, that act having the effect of so modifying by implication the older statute defining larceny. Hence a servant who, being without fraud entrusted with the possession of his master's goods, feloniously sells and thus converts them to his own use, is now guilty of embezzlement and not of larceny.

From the Vigo Criminal Circuit Court.

F. T. Hord, Attorney General, and *J. W. Shelton*, Prosecuting Attorney, for the State.

T. W. Harper and *J. M. Rees*, for appellee.

HAMMOND, J.—This is an appeal by the State upon questions of law reserved at the trial.

The appellee was charged in the indictment with the larceny of two mules from David Pugh. There was a trial by jury and a verdict of acquittal. The evidence is in the record, and shows, without conflict, the following facts:

In the spring of 1881 the appellee was in the employment of David Pugh, as a farm hand, and in hauling corn to market for Pugh, to Terre Haute; on the day of the alleged larceny, in March, 1881, Pugh sent him to that city with the two mules

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and a wagon loaded with corn, directing him to sell the corn and collect the money for it, and to return the same day. The appellee did not have permission to sell the mules. On reaching the city, before selling the corn, William R. Hunter met him and proposed to buy the mules. Appellee informed him that he would sell them after disposing of his load of corn. Afterwards, on the same day, he met Hunter again and informed him that he was ready to sell the mules, and drove to Hunter's livery stable. The price, \$250, was agreed upon, and he sold and delivered the mules to Hunter and received for them money through a check on the bank. He gave Hunter a bill of sale, signed with his own name. He left the wagon and harness at the livery stable, saying that he would soon return for them. When next heard from he was in Kentucky. Hunter was acquainted with the appellee and with the mules, and knew they belonged to Pugh. He supposed the appellee had a right to sell them, but made no inquiry of, and received no statement from, the appellee as to his authority in this respect.

The attorney for the appellant requested the court to give the jury this charge:

"If the jury find from the evidence that the defendant, in the year 1881, in Vigo county, and State of Indiana, was in the employment of David Pugh as servant or teamster, and had in his custody the team of mules of said Pugh, to haul to the city of Terre Haute a quantity of corn, and on the day of said hauling was directed by said Pugh to deliver the corn in said city and return the same day with said team of mules, and that the defendant, while having the mules in his custody as aforesaid, took and carried or drove the same to the livery stable of Fouts & Hunter, in the city of Terre Haute, and then and there sold and delivered the same to said Fouts & Hunter, or to William R. Hunter, without the knowledge, consent or authority of said David Pugh, and with the felonious intent of then and there converting said mules to his

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own use, then he is guilty of larceny of said mules and you should so find."

This instruction the court refused to give, but gave the jury, at the request of the appellee, the following:

"1. If the jury find from the evidence that the defendant was the employee of the prosecuting witness Pugh, and was working for Pugh upon his farm, and that Pugh sent the defendant to Terre Haute with a load of corn in a wagon with the mules charged to have been stolen, and that the defendant, while he still had possession of the mules, sold them, then he is not guilty of larceny, and you should find him not guilty.

"2. Larceny is the felonious stealing, taking and carrying away of the personal goods of another. If you find from the evidence that the defendant had the possession of the mules, with the consent of the owner, and sold them, you should find for the defendant.

"3. If the defendant had the lawful possession of the mules and sold them, then there was no such felonious taking as the law requires in a case of larceny, and you should find the defendant not guilty.

"4. If the servant, while in the employment of his master, has entrusted to his care any personal property of his master, and he feloniously sells and converts the same to his own use, he is, under the law of Indiana, guilty of embezzlement, but is not guilty of larceny."

The refusal of the court to give the instruction asked by the State, and the giving of those requested by the appellee, were duly excepted to by the appellant's attorney, and these rulings are assigned for error in this court.

The principle is well settled that to constitute a larceny there must be a felonious taking of the property. When property, which is lawfully in the custody of an employee or bailee, is criminally appropriated to the use of such employee or bailee, the offence may be embezzlement, but it can not

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be larceny. *Keely v. State*, 14 Ind. 36; *Hart v. State*, 57 Ind. 102; *Jones v. State*, 59 Ind. 229; *Umphrey v. State*, 63 Ind. 223; *Starck v. State*, 63 Ind. 285; Moore Crim. Law, section 918.

The evidence shows that the appellee was entrusted with the property by the owner. There is no evidence that he used fraud in procuring possession of it; nor is there any evidence of a criminal intent until after he arrived in the city. The criminal purpose probably entered his mind for the first time when Hunter proposed to purchase the mules. There was an entire absence of proof of a felonious taking of the property.

As the possession of the servant is the possession of the master, it may be that in the absence of a statute upon the subject of embezzlement, the evidence in this case would authorize a conviction for larceny. 2 Bishop Crim. Law, sections 853, 856; 2 Whart. Crim. Law, section 1840.

But the evidence clearly brings the appellee's act of converting to his own use his employer's property, within the provisions of the embezzlement act of March 21st, 1879, which was in force when he committed the wrong complained of. Acts 1879, p. 126. This act was later than the one then in force relating to larceny, and it can hardly be thought that the Legislature intended to make the same acts criminal under different statutes, defining separate offences. The rule is familiar that a statute, so far as it covers the same subject-matter of a former statute, repeals the previous enactment by implication.

Our conclusion is that the court below did not err in refusing the instruction tendered by the State, nor in giving those requested by the appellee.

The appeal is, therefore, not sustained.

Flora v. Cline.

No. 8594.

50 200
184 662

FLORA v. CLINE.

DRAINAGE.—*Assessment.—Work and Labor.*—A paragraph of complaint, averring that the plaintiff had instituted proceedings for the establishment and construction of a drain, which was defective, that the defendant and others benefited had executed a written waiver of irregularities, that on the request of the defendant the plaintiff constructed the drain, and the defendant promised to pay his share, which benefited the defendant \$600, and that the defendant stood by and saw the work done, is good on demurrer.

PRACTICE.—*Pleading.—General Denial.*—Where the general denial is pleaded, a special paragraph, averring facts which merely controvert the complaint, is needless, and it is not available error to sustain a demurrer to it.

SAME.—*Record.—Supreme Court.*—A motion to strike out a pleading, and the pleading struck out, unless made part of the record by bills of exceptions or other proper proceedings, can not be noticed by the Supreme Court.

From the Carroll Circuit Court.

J. Claybaugh and B. K. Higinbotham, for appellant.

MORRIS, C.—The appellee sued the appellant for work and labor. The complaint contained three paragraphs. The first and third paragraphs are in the usual form for work and labor.

The second paragraph states that on the 8th day of March, 1878, the plaintiff made application to the board of commissioners of Carroll county, stating, among other things, that he was the owner of certain wet lands therein described, and was interested in the construction of a drain to reclaim said lands, and that such drain could not be completed without affecting the lands of other persons; that the plaintiff employed a competent engineer to make a schedule of such lands as would be affected by the proposed drain, together with an estimate of the cost of the same, which were duly verified and delivered to the auditor of said county; that the plaintiff specified in said application the character of said proposed drain, giving its general course, extent, height, width, the amount of fall per mile, the points of beginning and termina-

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tion of said drain, and a description of the lands to be affected thereby, and the names of the owners and occupants of the same, so far as known; that said board appointed three disinterested freeholders of said county appraisers, to assess the benefits and damages to such lands incident to the construction of said drain; that the auditor of the county made out a transcript of the application and the proceedings of said board thereon, which was duly delivered to said appraisers; that the plaintiff in due form gave notice to all the owners of said affected lands of the time and place of the meeting of said appraisers to make such assessments; that on the 15th of April, 1878, after the filing of said application and the making of the order of said board, and the appointment of said appraisers, and before the meeting of said appraisers, the appellant and other landowners along the line of said proposed drain made and signed an instrument in writing, and delivered the same to the appellee, in which they voluntarily waived all errors, informalities and omissions in the petition, notice and order of the board made in relation to said drain, a copy of which is filed with the complaint. It is alleged that the appraisers met on the 29th day of April, 1878; that they, in the presence and with the approval of the appellant, examined all the lands affected by said drain, including the land owned by the appellant, and assessed the amount of benefits and injuries to each tract, and made a division of the cost of the construction of said drain among the owners of the land affected thereby, and that they found and fixed the whole cost at \$2,425, and assessed the defendant's portion at \$175, as the benefits accruing to the land owned by him; that said assessment was made in due form, verified by the appraisers and recorded in the auditor's office on the 25th day of May, 1878, and thus became a lien on the appellant's land. A copy of the assessment is filed as a part of this paragraph. The appellee then alleges that he had constructed the drain according to the specifications in said application for the same; that

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it runs near the appellant's residence, and that, during the time the ditch was being constructed, he told the appellee that it would benefit him, and that he should go on and complete the same, and that he would pay his share of the cost of constructing said ditch; that the appellee, relying upon the waiver of all defects in said proceedings and upon the acts and sayings of the appellant, and his direction to the appellee to proceed with the construction of said ditch through his, the appellant's, land, proceeded to construct and complete said ditch, at a cost to him of \$500; that the appellant's land was greatly benefited by the construction of said ditch; that the cost of constructing said ditch through the appellant's land exceeded the amount of said assessment, and amounted to \$600; that appellant stood by from day to day, during the construction of said drain, knowing that it would greatly benefit his land, and that the appellee was proceeding with the work in good faith, relying upon his acts and promises to pay for it; that he had, ten days before the commencement of this suit, demanded pay of the appellant for said work, but that he had refused to pay, etc.

The appellant demurred to this paragraph of the complaint. The demurrer was overruled. He then answered the second paragraph of the complaint by a general denial.

The appellant answered the first and third paragraphs of the complaint by a general denial. He also specially answered to the first paragraph, admitting that the appellee had performed the work stated and described therein, but alleging that it had been done under and pursuant to certain proceedings had by the appellee before the board of commissioners of Carroll county, pretending to establish a certain ditch or drain through the land of the appellee and others, and not through or by the procurement or authority of the appellant, nor by his consent, nor upon his request or promise to pay for the same; that by said proceedings the appellee claimed to have obtained a lien on the appellant's land for \$175.

The appellant also answered the first and third paragraphs.

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of the complaint by what he calls a plea in abatement, admitting that the appellee had done the work mentioned in the complaint on the lands therein described, but alleging that it had been done pursuant to certain proceedings had before the board of Carroll county for the purpose of establishing a drain. A copy of the application for the establishment of the drain, together with a full transcript of the proceedings before the board in relation to said drain, were filed with and as part of this paragraph of the answer. It is alleged that the work was done by the authority to do the same conferred upon the appellee by these proceedings, and not otherwise; that the appellee pretended and claimed to have a lien on said land for \$175, assessed against it in said proceedings.

The appellant also filed a fourth and fifth paragraph of answer to the first and third paragraphs of the complaint. A portion of the fourth paragraph of the answer was stricken out on motion of the appellee, but the motion is not in the record by bill of exceptions or otherwise, and will not for that reason be noticed. The appellee replied to the fourth and fifth paragraphs of the answer, and demurred to the second and third paragraphs. The demurrers were sustained.

The cause was submitted to a jury, who returned a verdict for the appellee. The appellant moved the court for a new trial. The motion was overruled. He also moved in arrest of judgment, which was overruled. The evidence is not in the record.

The errors assigned are as follows:

1. That the court erred in overruling appellant's demurrer to the second amended paragraph of the complaint.
2. The court erred in sustaining the appellee's demurrer to the second and third paragraphs of the appellant's answer.
3. In sustaining the appellee's motion to strike out a part of the fourth paragraph of the answer.
4. The court erred in overruling the appellant's motion for a new trial.

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5. The court erred in overruling the appellant's motion in arrest of judgment.

We think the court did not err in overruling the demurrer to the second paragraph of the complaint. If, as is alleged in this paragraph, the appellant stood by from day to day, saw the plaintiff doing the work, encouraged him to proceed with it, promising to pay what the work should be worth, he would be liable, though the proceedings before the board of commissioners in relation to the drain were altogether void. *Nevins, etc., Draining Co. v. Alkire*, 36 Ind. 189; *Hellenkamp v. City of Lafayette*, 30 Ind. 192.

The reference in this paragraph to the proceedings before the board was not altogether irrelevant. The recitals, though not sufficient to constitute a cause of action, gave meaning and force to the conduct and promise of the appellant to pay for the work. The written statement, executed by the appellant and others interested in the proceedings before the board, that they "waived all error, informality or omission, either of notice, petition or order of the board of commissioners," shows that the appellant then knew that the proceedings were defective, and that he must have intended that the appellee should rely upon his promise rather than upon such proceedings for his pay. Upon the facts stated the appellant was liable for the work done. The cause of action was his alleged promise to pay the appellee for the work.

Nor did the court commit any available error in sustaining the demurrer to the second paragraph of the appellant's answer to the first paragraph of the complaint. If the answer was good, it was because it denied, argumentatively, that the work was done by the appellee, as alleged in the first paragraph of the complaint, upon the request and at the instance of the appellant. This paragraph of the answer alleges that the work was done under and pursuant to proceedings had before the board of commissioners to establish said drain, and not at the request of the appellant. If such was the fact, it could have been proved under the general denial which was

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pledged to each paragraph of the complaint. To make out his case under the first paragraph of the complaint, the appellee would have to prove facts which would show that the work had been done upon the implied or express request of the appellant. Under the general denial, the appellant would have the right to prove any fact which would tend to negative the matters of fact which the appellee was bound to prove in making out his case. *Port v. Russell*, 36 Ind. 60 (10 Am. R. 5). All the material matter alleged in the second paragraph of the answer was provable under the general denial. There was no error in sustaining the demurrer to this paragraph of the answer.

Nor was there any error in sustaining the demurrer to the third paragraph of the answer. The matter alleged is not in abatement, but in bar of the cause of action set forth in the first and third paragraphs of the complaint. Assuming that the facts set up in this paragraph of the answer show that the ditch made by the appellee was validly established by the proceedings had before the board of commissioners of Carroll county, and that the appellee made the ditch, not at the request of the appellant, but under the authority of and pursuant to such proceedings, proof of such facts would bar the causes of action sued on. It would show that the promise declared upon in these paragraphs was never made and never existed; and such proof would be in direct contravention of the principal fact which the appellee would have to establish in making out his case, and therefore admissible under the general denial; but the proceedings before the board, as set out in this paragraph, fail to show that the drain had been legally established, or that any lien was thereby created on the appellant's land. There were not sufficient facts alleged in the petition to give the board jurisdiction of the subject. The material part of the paragraph is that the work was done without the consent of the appellant. There was no error in sustaining the demurrer to this paragraph of the answer. Though the drain had been legally established by the action of the board of commissioners, yet, if the appellant promised

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to pay for the work, as alleged in the first and third paragraphs of the complaint, he would be bound by his promise; if he did not so promise, he would not be liable on these paragraphs, whether the ditch had been legally established or not.

There is no question presented for decision as to the action of the court upon the motion to strike out a part of the fourth paragraph of the answer. It is impossible to say from the record what portion of the answer was stricken out. Besides, the motion is not made a part of the record by bill of exceptions. As the evidence is not in the record, we can not say that the court erred in overruling the motion for a new trial. It is said that the court erred in permitting the appellee to read in evidence a transcript of the proceedings of the board of commissioners in relation to said drain. But there is nothing in the record from which we can determine whether such transcript was read in evidence or not. We can only know what evidence was given to the jury by a bill of exceptions signed by the judge and made a part of the record.

The motion in arrest of judgment is not pressed with much confidence. We think there is no ground upon which it could be sustained.

We conclude that there is no available error in the record, and that the judgment below should be affirmed.

PER CURIAM.—It is ordered, upon the foregoing opinion, that the judgment below be affirmed, at the cost of the appellant.

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No. 10,244.

STORM v. ERMANTROUT ET AL.

RECEIVER.—Appointment of.—Collateral Attack.—An order of court appointing a receiver can not be collaterally attacked.

SAME.—Mortgage.—Rents.—Where mortgaged property is insufficient to pay the debt, and the debtor is insolvent, the creditor may have a receiver appointed to collect and apply the rents to the payment of the mortgage debt.

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SAME.—*Res Adjudicata.*—Where a decree has been rendered adjudging that the mortgagee is entitled to the rents accruing from the mortgaged property, and a receiver is appointed and directed to collect and apply the rents to the mortgage debt, the mortgagor can not afterwards claim that he is entitled to such rent.

SAME.—*Execution.*—*Exemption.*—Where the mortgagee, in a suit to foreclose, asks for the appointment of a receiver, claiming the application of rents to the payment of his debt, the proper time for the mortgagor to claim such rent as exempt from execution is upon the hearing of the motion for the appointment of a receiver.

SAME.—*Answer.*—*Judgment.*—*Collateral Attack.*—Suit by a mortgagor against a mortgagee to recover rents collected by a receiver appointed in a suit to foreclose the mortgage. Answer, that the money belonged to W., who had been appointed receiver to collect the rents, and was directed by decree of the court to pay the same to the defendant upon his demand, for the reason that the mortgaged premises were not sufficient to pay the debt, and that the plaintiff was insolvent; that the sum realized on sale of the mortgaged property, with the rents collected as decreed, is not enough to satisfy the mortgage debt.

Held, that the answer was good on demurrer, and that the decree directing the receiver to pay the rents to the mortgagee was an adjudication which could not be attacked collaterally.

From the Montgomery Circuit Court.

T. H. Ristine and E. C. Snyder, for appellant.

G. W. Paul and J. E. Humphries, for appellees.

ELLIOTT, J.—Appellee Ermantrou instituted this action to recover money collected by a receiver appointed in a foreclosure suit brought by the appellant, claiming that he was entitled to it under the exemption law. The appellant answered that the money claimed was the property of Milton B. Waugh, who had been appointed a receiver; that he, the appellant, had obtained a decree for a receiver to collect rents from the mortgaged premises, upon the ground that they were not sufficient in value to pay the debt, and that the appellee was insolvent; that the decree directed the receiver to take charge of the mortgaged property, collect the rents and apply them to the payment of the mortgage debt; that the receiver collected the rents under the decree, and that the sum realized from the sale

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of the mortgaged property, together with the rent so collected, is not sufficient to satisfy the debt due appellant.

This answer shows that the court rendered a decree ordering the collection of the rents by a receiver and their application to the appellant's debt. The decree which the answer avers was rendered goes further than to direct that money be collected by a receiver and brought into court, for, according to the allegations of the answer, it adjudged that the rents should be collected for the benefit of the mortgagee and applied to the payment of his debt. This was necessarily an adjudication that the mortgagee was entitled to the rents, and, of course, if he was entitled to them, the mortgagor could not have a right to them upon any ground. The case is not one of a receiver appointed and directed to bring money into court for distribution under its order, but is one wherein the court decrees that the mortgagee has a right to the money which the receiver collects. The question before us is, therefore, this: Is a mortgagor entitled to claim as exempt from execution rents accruing from mortgaged property in a case where a decree has been rendered, adjudging that the mortgagee is entitled to them, appointing a receiver, and directing him to collect and apply the rents to the mortgage debt?

The question is not whether it was proper to adjudicate the question of the mortgagee's right to the rent, but what is the effect of the adjudication? It is not competent for the appellee to attack in this collateral manner the judgment of the court appointing the receiver. An order of a court appointing a receiver can not be impeached in a collateral proceeding. The question of the power of the court to appoint the receiver, as well as all other questions concerning the regularity of his appointment, is conclusively settled by the decree in the foreclosure suit.

The decree in the suit on the mortgage settles the question of the authority of the receiver to collect the rent, and we can not enquire whether the order for the receiver was or was not authorized by the redemption law in force at the time it

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was made. In adjudging that the appellant was entitled to a receiver, the court necessarily decided that the redemption law did not deny him that right. All questions as to the right to a receiver, and as to his authority to collect the rent, are, therefore, settled, and can not be re-examined.

It is argued by appellee that the purchaser at the sale on the decree of foreclosure, and not the mortgagee, is entitled to the rents; but we can not see what benefit would accrue to him if it were granted that the rent did belong to the purchaser, for no matter to which it belongs the appellee can not secure it. It is really immaterial to which of the two, the mortgagee or purchaser, the money belongs; if to either, the appellee has no right to it, and if he has a right to it his right is good against either. His success depends upon his own right to the money, not upon the right of some one else. But this question is disposed of by the adjudication that it shall be applied in payment of the mortgage debt.

It is true, that, under our statute, a mortgage, although it creates an interest, does not vest an estate in the mortgagee. *Favorite v. Deardorff*, 84 Ind. 555. Where, however, it appears that the mortgaged property is insufficient and the debtor insolvent, an equity is created which gives a right to a receiver. *Favorite v. Deardorff, supra*; *Connelly v. Dickson*, 76 Ind. 440. The whole doctrine of the power to appoint receivers is ably discussed in *Schreiber v. Carey*, 48 Wis. 208, and it is said that the right is denied in only two States of the Union, Michigan and California. Our investigation has, however, induced us to believe that New Jersey must be classed with those two States, but that court, while professing to act upon what it conceives to be the English rule, has, in our opinion, clearly misconceived it. *Berney v. Sewell*, 1 Jac. & W. 627; *Cupit v. Jackson*, 13 Price, 721; *White v. Smale*, 22 Beav. 72; *Ackland v. Gravener*, 31 Beav. 482; *Bryan v. Cormick*, 1 Cox Ch. 422. The American cases are well agreed upon this subject. *Hill v. Robertson*, 24 Miss. 368; *Hyman v. Kelly*, 1 Nev. 179; *Williams v. Noland*, 2 Tenn. Ch. 151;

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Douglass v. Cline, 12 Bush, 608; *Boyce v. Boyce*, 6 Rich. Eq. 302; *Warner v. Gouverneur*, 1 Barb. 36; *Bank v. Arnold*, 5 Paige, 38, and authorities cited in *Favorite v. Deardorff*, *supra*. This enquiry is, however, subsidiary to our main purpose, but necessary for the purpose of ascertaining what is necessarily decided in cases where the court decrees the appointment of a receiver and the application of the rents to the payment of the mortgage.

It is evident, that where the decree of the court is, that the applicant has a right to have a receiver appointed and authorized to collect the rents accruing from the mortgaged premises, and to have them applied in payment of the mortgage debt, it necessarily adjudges that the debtor has no claim to them. The petition for a receiver in such a case challenges the mortgagor to assert his right to the rent claimed by the mortgagee, and affords full opportunity for litigating the question. The right of the mortgagee to the rent excludes that of the mortgagor, and the decision of that question concludes both parties.

It is clear that the right of the mortgagor to the rents is directly brought in issue by the complaint or motion for a receiver in a case where the rents are claimed for the purpose of paying the mortgage debt, and we can perceive no reason why the right under the exemption law is not concluded by the judgment appointing a receiver. There are analogous cases which establish a principle that should govern here. In the case of *State, ex rel., v. Manly*, 15 Ind. 8, it was held that where property is attached the exemption must be claimed prior to the order of sale, or the right to claim the property as exempt will be deemed to have been waived. In *Perkins v. Bragg*, 29 Ind. 507, the same rule is declared, the court saying: "Whether the property attached is subject to execution is *res adjudicata*, after judgment in attachment." The ruling in *Slaughter v. Detiney*, 15 Ind. 49, is that after mortgaged property has been ordered to be sold, it is too late for the debtor to claim it as exempt, for the reason that the judgment concludes him

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from making any such claim. In *Haynes v. Meek*, 14 Iowa, 320, it was held that a homestead right was barred by a failure to set it up in the foreclosure suit, and to the same effect are the cases of *McCreery v. Fortson*, 35 Texas, 641; *Rector v. Rotton*, 3 Neb. 171. The case of *Miller v. Sherry*, 2 Wal. 237, applies the doctrine of *res adjudicata* to a decree upon a creditor's bill, holding that after it had been entered the debtor could not claim the benefit of the homestead law. It has been often held that the right to exemption is a personal privilege which the debtor waives by not insisting upon it at the proper time, and this rule we think applicable to the present case. *State, ex rel., v. Melogue*, 9 Ind. 196; *State, ex rel., v. Manly, supra*; *Perkins v. Bragg, supra*; *Gregory v. Latchem*, 53 Ind. 449; *Twinam v. Swart*, 4 Lans. 263.

Where a mortgagee petitions for a receiver, claiming specific rents and their application in payment of the mortgage debt, the proper time for the mortgagor to assert his right to claim the rents as exempt is upon the hearing of the motion or complaint for the appointment of the receiver. *Newcome v. Wiggins*, 78 Ind. 306.

The case is unlike that of a general motion for the appointment of a receiver, for here there is a claim to specific rents and an adjudication that the complainant is entitled to them. We need not, and do not, decide what would be the effect of an ordinary order appointing a receiver in which there is no adjudication of the right to the money when collected by the receiver; nor do we mean to decide the question whether a mortgagor has a right to claim as exempt rents issuing out of property conveyed by way of mortgage. *Thompson Homesteads & Ex.*, section 741; *Love v. Blair*, 72 Ind. 281. We decide only the questions directly presented by the ruling on the demurrer to the answer and argued by counsel.

Judgment reversed.

Mattill v. Baas.

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No. 9521.

MATTILL v. BAAS.

MARRIED WOMAN.—Fraudulent Conveyance.—Judicial Sale of Husband's Lands.—Bankruptcy.—A wife joined her husband in a conveyance to S. of his lands to defraud his creditors, and the husband was afterwards adjudged a bankrupt. The assignee brought a suit against S. to set aside the fraudulent conveyance, which was compromised by S. conveying the lands by quitclaim to the assignee, who afterwards sold and conveyed the same as part of the bankrupt's estate.

Held, that the wife, by virtue of section 2508, R. S. 1881, was entitled to one-third of the lands in fee simple.

From the Superior Court of Marion County.

J. E. McDonald and J. M. Butler, for appellant.

A. G. Howe and V. Carter, for appellee.

HAMMOND, J.—Action by the appellee against the appellant for partition of real estate. Issue was made, trial by the court, finding and judgment for the appellee.

The appellee alleges in her complaint, that at the time of its filing, and for ten years prior thereto, she was and had been the wife of Henry Baas; that her said husband, on June 5th, 1877, filed his petition in bankruptcy; that J. M. Bradshaw was appointed assignee; that on July 9th, 1877, the register in bankruptcy assigned and conveyed all of Baas' estate to the assignee; that, at the time of filing his petition to be adjudged a bankrupt, Baas owned lots 6 and 7, more particularly described, in the city of Indianapolis; that on January 29th, 1878, under special order of the court, the assignee sold and conveyed in fee simple said lots to the appellant for \$4,000; that at the time of such sale and conveyance said lots were a part of the estate of Baas; that said sale was a judicial sale; that the appellee owns the undivided one-third of said lots; and that before bringing suit she demanded her said interest in said lots from the appellant, but that her demand was refused.

The appellant answered, averring that on May 19th, 1877, before Baas filed his petition in bankruptcy, he, said Baas,

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conveyed by warranty deed, his wife, the appellee, joining therein, said lots to Philip Sparcke ; that Sparcke, unmarried, on November 29th, 1877, conveyed said lots by quitclaim deed to Bradshaw, the assignee in bankruptcy ; and that the latter, by assignee's deed, on January 29th, 1878, conveyed the same to the appellant.

The appellee replied by the general denial, and also by a second paragraph, that the deed from Baas and the appellee to Sparcke was executed in fraud of the bankrupt act, and to defraud Baas' creditors ; that on September 22d, 1877, the assignee filed his complaint against Sparcke in the court in which the bankruptcy proceedings were pending, for the purpose of setting aside said fraudulent conveyance ; that issues thereon were made, but that Sparcke, knowing that he could not hold the property, agreed by compromise to convey, and did convey, it to the assignee by quitclaim deed, as part of the property of Baas ; that the court thereupon approved said compromise, adjudged said property to belong to the estate of Baas, and that the same was afterwards sold and conveyed by the assignee to the appellant as part of the estate of Baas.

The appellant's demurrer to the second paragraph of the reply was overruled, and an exception reserved. The court, at the request of the appellant, found the facts and conclusions of law specially. The facts as found by the court are substantially the same as those alleged in the pleadings.

The following were the conclusions of law on the facts as found by the court :

"1st. That the said conveyance by said Henry Baas to said Philip Sparcke was in fraud of the bankrupt act hereinbefore mentioned.

"2d. That making and performance of the compromise agreement hereinbefore mentioned amounted in legal effect to a rescission of the said conveyance by said Henry Baas to said Sparcke as fully to all intents and purposes as if the said Henry Baas and said Sparcke had rescinded the same before the bankruptcy of said Baas, and as fully as if the said United

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States District Court had rendered a decree finding the allegation of the bill of said assignee to be true, and had decreed the relief prayed for.

"3d. That such being the legal effect of said compromise agreement, the plaintiff is entitled to all the rights which she would have had if her said husband, Henry Baas, had never executed said conveyance to said Sparcke.

"4th. That plaintiff is entitled to partition as prayed."

[Signed] "DANIEL WAIT HOWE, Judge."

The appellant excepted to each of the above conclusions of law. The overruling of the appellant's demurrer to the second paragraph of the appellee's reply, and the said several conclusions of law are the alleged errors complained of.

The appellee bases her right to recover one-third of the lots in controversy upon section 1 of the act of March 11th, 1875, being section 2508, R. S. 1881, which is as follows:

"In all cases of judicial sales of real property in which any married woman has an inchoate interest by virtue of her marriage, where the inchoate interest is not directed by the judgment to be sold or barred by virtue of such sale, such interest shall become absolute and vest in the wife in the same manner and to the same extent as such inchoate interest of a married woman now becomes absolute upon the death of the husband, whenever, by virtue of said sale, the legal title of the husband in and to such real property shall become absolute and vested in the purchaser thereof, his heirs or assigns, subject to the provisions of this act, and not otherwise. When such inchoate right shall become vested under the provisions of this act, such wife shall have the right to the immediate possession thereof; and may have partition, upon agreement with the purchaser, his heirs or assigns, or upon demand, without the payment of rent, have the same set off to her."

The above act, as has been decided by this court, should be liberally construed for the purpose of carrying out the intention of the Legislature in its enactment. In *Roberts v. Shroyer*, 68 Ind. 64, it was held that the conveyance of the bankrupt's

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property by the register to the assignee in bankruptcy was a judicial sale, within the meaning of the statute, and that such sale made absolute the wife's inchoate interest in lands of her husband.

The point in controversy in this case is whether the appellee, by joining with her husband in the fraudulent conveyance to Sparcke before the filing of the petition in bankruptcy, is thereby estopped from asserting title to one-third of the lots. It is claimed by the appellant that at the time of the conveyance of the bankrupt's property by the register to the assignee, the appellee, by the conveyance to Sparcke, had no inchoate interest in the land to become vested in her. It is true, as claimed for the appellant, that a fraudulent conveyance, as between the parties thereto, is valid. Neither party is permitted to question its legality. By the statute of this State, as well as by the bankrupt law in force when the conveyance to Sparcke was executed, conveyances of real estate made to defraud creditors were void *as to creditors*. Sec. 4915, R. S. 1881.

Under the averments of the appellee's second paragraph of reply, and the facts found specially by the court, the conveyance to Sparcke, having been made to defraud Baas's creditors, was, as to such creditors, void, and conveyed no title. When the register conveyed Baas's property to the assignee, to be disposed of for the benefit of creditors, such conveyance to the assignee, as to such creditors, carried to the assignee the title to the lots in controversy just the same as if the previous conveyance to Sparcke had not been made. And when the assignee, in compromise of the action brought to avoid the fraudulent conveyance, procured from Sparcke the quitclaim deed, he obtained thereby no title whatever, because Sparcke held no title as against Baas's creditors. The conveyance from Sparcke to the assignee served the purpose only of removing a cloud from a title which was already perfect in the assignee by the conveyance from the register. We think it is clear that the appellant's title is derived from Baas through the register's deed to the assignee, and not from Baas,

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through his conveyance to Sparcke and the deed of the latter to the assignee. The creditors of the bankrupt elected to treat the conveyance to Sparcke as void. Neither they, nor those claiming title through the proceedings in bankruptcy, can now be heard to say that that conveyance was valid for any purpose. It was void as to them for the purpose of putting the bankrupt's property beyond their reach. So, also, it was void as to them as affecting the inchoate interest of the wife. As to creditors, it neither benefited the husband nor prejudiced the wife. In all respects, as between the bankrupt and his wife upon one side, and the creditors upon the other, the conveyance to Sparcke is to be regarded as though it had not been made.

These views are sustained by the authorities. In *State Bank v. Davis*, 4 Ind. 653, the relations of a fraudulent grantor with respect to his creditors and his grantees are shown to be quite different. As to the former the conveyance is void; as to the latter he is estopped from questioning its validity. *Ketchum v. Schicketanz*, 73 Ind. 137, was very similar to the case at bar. In that case the plaintiff's husband had purchased real estate at sheriff's sale, and, to defraud creditors, had assigned the certificate of purchase to his son, who received a sheriff's deed. On his own petition he was afterwards adjudged a bankrupt, and by proper judicial proceedings the assignment and transfer of the real estate to the son were decreed to be fraudulent and void, and the property, on the order of court, was conveyed by the register to the assignee, and sold by the latter to the defendant. The plaintiff's title to one-third of the land being denied by the defendant, the court, in the opinion in that case, says: "The only title which the defendant asserts to the lots came to him from the bankrupt, through the proceedings in bankruptcy, and he ought not to be heard to say, for the purpose of defeating the plaintiff's claim, that the bankrupt had no title to those lots when he was adjudged a bankrupt."

In *Lowry v. Fisher*, 2 Bush (Ky.) 70, and *Dugan v. Massey*,

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6 Bush, 81, it was held that the surviving wife of a grantor in a fraudulent deed, she having joined in it, is not, when it is set aside at the instance of creditors, barred of her right of dower as against the creditors or the purchasers under a judgment subjecting the lands to their debts. To the same effect are *Richardson v. Wyman*, 62 Maine, 280; 'S. C., 16 Am. R. 459; *Summers v. Babb*, 13 Ill. 483; *Malloney v. Horan*, 49 N. Y. 111; S. C., 10 Am. R. 335. And as showing that a fraudulent grantor, as to creditors, has the same rights in his property after the conveyance is set aside at their instance as he would have, had such conveyance not been made, the following cases are referred to: *Sears v. Hanks*, 14 Ohio St. 298; *Ridgway v. Masting*, 23 Ohio St. 294 (13 Am. R. 251).

The court below did not, in our opinion, err in overruling the appellant's demurrer to the second paragraph of the appellee's reply, nor in its conclusions of law.

Judgment affirmed, at the appellant's costs.

No. 10,363.

McCABE v. BERGE ET AL.

HUSBAND AND WIFE.—*Tort of Wife.*—*Judgment.*—*Execution.*—*Exemption.*—At common law, the husband is liable for the tort of his wife, not on account of any breach of the marriage contract, but as an incident of the marriage relation or status. Therefore, where judgment was rendered against a husband for the tort of his wife, and an execution was issued thereon, he could not claim any part of his property as exempt from sale on such execution upon the ground that his liability for his wife's tort resulted from his marriage contract with her.

SAME.—*Wife's Tort.*—*Statutory Rule.*—Under section 5120, R. S. 1881, in force since September 19th, 1881, husbands are not liable for the torts of their wives.

From the Monroe Circuit Court.

J. F. Pittman, for appellant.

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Howk, J.—The only error complained of by the appellant, the plaintiff below, is the decision of the circuit court in sustaining a demurrer, for the want of sufficient facts, to his complaint. He alleged in substance in his complaint, that he was, and had been for ten years last past, a *bona fide* resident and householder of Monroe county; that on the 29th day of November, 1879, the appellee Anna Berge recovered judgment against the appellant and his wife, Martha McCabe, for \$50 damages, and costs taxed at \$117.65, for slanderous words alleged to have been spoken by said Martha McCabe of and concerning the said Anna Berge; that the appellant had been made a defendant in said action for slander, solely because he was the husband of said Martha McCabe, against whom alone the cause of action existed; that the appellee Anna, on the 8th day of March, 1881, sued out an execution on her said judgment, and delivered the same to her co-appellee, Silas Grimes, then and since the sheriff of said county; that on July 2d, 1881, the appellee Grimes, as such sheriff, levied said execution on the appellant's real estate, in Monroe county, and had advertised the same for sale on August 13th, 1881, to satisfy said judgment, costs and accruing costs; that on August 3d, 1881, for the purpose of securing the benefits of the exemption laws of this State, the appellant made out a full, true and complete schedule and inventory of all such property, rights, credits and effects had or held by him on the 8th day of March, 1881, as were required by the exemption laws to be inventoried and scheduled and subscribed and sworn to by him, and then and there delivered the same to the appellee Grimes as such sheriff, and then and there demanded of and requested such sheriff to set off to him, as exempt from sale, on said execution, all the property, real and personal, described in his schedule, belonging to him, who was then and there a resident householder of this State; that the appellee Grimes, as such sheriff, caused the said property so inventoried and scheduled to be duly appraised, and the appellant's interest therein was valued and appraised at a sum less than \$600;

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whereupon appellant again demanded that all of said property, real and personal, be set off to him as exempt from sale on said execution, which the appellee Grimes, as such sheriff, then and since refused to do ; and the appellant said that the total value of his real and personal property and money required by the exemption laws to be inventoried, was \$369.70, and less than \$600 ; that on November 28th, 1879, the appellant was, and had since continued to be, a resident householder of Monroe county, and that, as against the appellant, the judgment in favor of appellee Anna Berge did not arise out of or sound in tort. Wherefore, etc.

In section 22 of the Bill of Rights, in the Constitution of this State, it is provided that "The privilege of the debtor to enjoy the necessary comforts of life shall be recognized by wholesome laws, exempting a reasonable amount of property from seizure or sale for the payment of any debt or liability hereafter contracted." In section 703, R. S. 1881, in force at the time of the rendition of the judgment, and of the issue of the execution thereon, mentioned in appellant's complaint, it is provided as follows: "An amount of property not exceeding in value six hundred dollars, owned by any resident householder, shall not be liable to sale on execution or any other final process from a court, for any debt growing out of or founded upon a contract, express or implied, after the taking effect of this act." On behalf of the appellant, it is claimed by his counsel, that the judgment against him in favor of Anna Berge was not founded upon any tort by him committed, but that his liability in damages to Anna Berge grew out of, and was founded upon, his express contract of marriage with his wife, Martha McCabe. Appellant's counsel says, interrogatively, "Why is it, under the allegations of the complaint, that appellant was a party to the action of slander at all? It was not because he was a wrong-doer ; not because he was a slanderer of the appellee Anna Berge, but because he was the husband of the wrong-doer, his wife, Martha McCabe. Why make him a party rather than another? Simply for the reason that under

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the common law, when he entered into a marriage contract with the wrong-doer, Martha McCabe, his wife, he undertook to be answerable for her torts, and there can be no doubt that he is liable. But the appellant insists that he is civilly liable and *not* as a wrong-doer himself, and, hence, the judgment, upon which the execution was issued, arose (in the language of the Constitution) out of a liability and (in the words of the statute) was a debt growing out of, or founded upon, a contract, express or implied. It is submitted by appellant's counsel that a proper construction of the Constitution and statute above referred to will entitle the appellant to the exemption."

We have given the appellant's counsel the benefit of a full statement of his position and of his line of argument, in his own language, although we are clearly of the opinion that his position is untenable and his argument is unsound and illogical. If it were conceded that the appellant might have claimed at any time that the right of action of the appellee Anna Berge against him for the slanderous words spoken of her by his wife, Martha McCabe, grew out of or was founded upon any breach of his marriage contract, it is very clear, we think, that the claim ought to have been asserted in the suit for the slander, and before such right of action was merged in the judgment. For aught that appears to the contrary, the judgment in the slander suit against the appellant, as well as against his wife, Martha, was for damages resulting directly, not from his marriage contract, or any breach thereof, but from the tortious conduct or language of his wife. The judgment against him for damages in the slander suit concludes the question of the exemption of his property from sale on execution issued on such judgment, and is a complete bar to his subsequent claim for such exemption. *Slaughter v. Detiney*, 15 Ind. 49; *Sullivan v. Winslow*, 22 Ind. 153; *Lore v. Blair*, 72 Ind. 281.

But aside from this we are of opinion that, under the common law, the liability of the husband for the torts or wrong-

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ful speech or conduct of the wife did not grow out of, nor was it founded upon, in any proper or legal sense, the contract of marriage, or any breach of such contract. In section 5324, R. S. 1881, in force since July 2d, 1877, "Marriage is declared to be a civil contract, into which males of the age of eighteen and females of the age of sixteen, not nearer of kin than second cousins, and not having a husband or a wife living, are capable of entering." As between the immediate parties, under the law, marriage is "a civil contract"; but, as between them and the State or organized society, marriage is more than a civil contract. It is a status or relation. The common law liability of the husband for the torts of his wife was merely an incident of the marriage relation or status. *Ball v. Bennett*, 21 Ind. 427; *Choen v. Porter*, 66 Ind. 194; *Stockwell v. Thomas*, 76 Ind. 506; Cooley Torts, 115. It can not be said, therefore, that the appellant could lawfully claim any of his property as exempt from sale on the execution issued on the judgment recovered by Anna Berge against him for the tort of his wife.

The appellee's demurrer to the complaint was correctly sustained.

In conclusion we direct attention to section 5120, R. S. 1881, in force September 19th, 1881, wherein it is provided as follows:

"Married women, without reference to their ages, shall be liable for torts committed by them; and an action may be prosecuted against them for torts committed, as if unmarried. Husbands shall not be liable for the contracts or the torts of their wives."

The judgment is affirmed, with costs.

Opinion filed at the November term, 1882.

Petition for a rehearing overruled at the May term, 1883.

Sayers et al. v. The First National Bank of Crawfordsville.

No. 9950.

SAYERS ET AL. v. THE FIRST NATIONAL BANK OF CRAWFORDSVILLE.

CORPORATION.—Name.—Pleading.—Where the name of the plaintiff imports a corporation, it is not necessary to aver in the complaint that the plaintiff is a corporation.

SAME.—Endorsement.—The endorsement of a note to “The trustees of the Indiana Asbury University” does not vest title in the persons who are trustees, and where there is a further endorsement, “Trustees of Indiana Asbury University, by John W. Ray, treas.,” it will not be assumed, contrary to averment, that Ray had no authority to make such endorsement.

PLEADING.—Complaint.—Amendment.—A complaint on a note, and to foreclose a mortgage securing it, may be amended, without leave, at any time before trial, by the withdrawal of so much as relates to the mortgage.

SAME.—Answer After Issue.—The refusal to permit the defendant, after the issues are closed, to plead an additional defence, which, if true, must have been known before, is not error.

SAME.—Variance.—Name of Bank.—The variance between “1st Nat. Bank of Crawfordsville, Ind.,” and “First National Bank of Crawfordsville,” is amendable on the trial, and will not be regarded in the Supreme Court.

From the Montgomery Circuit Court.

J. McCabe and E. F. McCabe, for appellants.

G. W. Paul, M. D. White and J. E. Humphries, for appellee.

ELLIOTT, J.—The complaint as it originally stood was upon a promissory note and mortgage; but before trial so much of the complaint as sought an enforcement of the mortgage was withdrawn.

The name First National Bank of Crawfordsville imports a corporation, and it was not necessary for the pleader to allege that the appellee was incorporated. Where the name used “argues a corporation,” there is no necessity for averring a corporate organization. *Mackenzie v. Board, etc.*, 72 Ind. 189; *Indianapolis Sun Co. v. Horrell*, 53 Ind. 527.

The note was endorsed by the payee to the immediate endorsee of appellee in the name of the “trustees of the Indiana Asbury University,” and this, it is said, vests title in the trus-

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tees individually. We can not assent to this proposition. No individuals are named, and we can not say that the name used is not the corporate name, and if it is the corporate name then, of course, title vested in the corporation and not in the individuals who chanced to hold the office of trustees.

The endorsement to appellee is signed, "Trustees of Indiana Asbury University, by John W. Ray, treas." and we can not, in the face of the allegations of the complaint, say that he was not authorized to execute the endorsement.

The appellee was rightfully permitted to dismiss so much of the complaint as sought a decree of foreclosure. A plaintiff may at any time before trial withdraw part of his cause of action in cases where the cause is severable.

The trial court has a large discretion in the matter of permitting or refusing amendments, and we can not say that this discretion was abused in refusing to permit the appellant Sayers to file an answer setting up his discharge in bankruptcy. The offer was not made until after the issues had been closed and the case called for trial. Courts have a right to require diligence in the formation of issues, and carelessness in filing answers where defences are fully known is not to be encouraged. Such a defence as that which appellant sought to interpose could not have been unknown, nor could the necessity of specially pleading it have been doubtful.

One who executes a note secured by mortgage is personally liable on the note, and in the same action personal judgment may be rendered and a decree foreclosing the mortgage entered, so that the personal liability of appellant Sayers was none the less while the part of the complaint seeking a foreclosure was standing, nor was it any greater after that part was withdrawn. The materiality of such a defence was not affected by the withdrawal of the part of the complaint mentioned.

The endorsement of the note read in evidence thus gives the name of appellee: "1st Nat. Bank of Crawfordsville, Ind." and it is claimed that there is a fatal variance. We are by no means satisfied that the abbreviations are not such as we

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might judicially interpret without extrinsic aid (*Locke v. Merchants Nat. Bank*, 66 Ind. 353) ; but, however this may be, we are satisfied that the defect might have been remedied by amendment in the court below, and, this being so, it will not warrant a reversal. *Zann v. Haller*, 71 Ind. 136 (36 Am. R. 193).

Judgment affirmed.

No. 10,159.

WILCOX v. MOUDY ET AL.

SHERIFF'S RETURN.—Amendment.—Record.—Practice.—A motion by a sheriff for leave to amend his return to a writ, so that the return may speak the whole truth, is not a civil action; pleadings, issues, a jury trial and change of venue are improper, but the court should grant the leave, on a showing by affidavit or otherwise, whenever the truth and justice require it, and may direct the clerk so to amend the record of the return that it will be as the amended return.

SAME.—A sheriff's return to a writ is made on his official responsibility, and he only can afterwards amend it, but it must be on leave. The court can not compel him to correct it.

From the Hendricks Circuit Court.

C. C. Nave, for appellant.

J. V. Hadley, E. G. Hogate and R. B. Blake, for appellees.

BLACK, C.—The appellee James M. Emmons, sheriff of Hendricks county, on the 15th of March, 1882, filed in the court below a motion showing that, as such sheriff, he, by his deputy named, on the 14th of June, 1879, sold certain real estate to the appellee Alfred Moudy, on a judgment and decree in favor of said Moudy and against the appellant; that said deputy as such made a written return of said sale, and therein, through inadvertence, omitted to state that the fee simple of said real estate was offered in parcels, as by law required; that the real estate was by said deputy so offered; that said Emmons was present at the sale, and he knew that

Wilcox v. Moudy et al.

the real estate was so offered ; that he had returned the certified copy of said decree and judgment issued to him ; that it had been recorded in an execution docket specified, on a page thereof designated ; and that he was still the sheriff of said county. He asked the court to permit him to so amend said return as to show that said real estate was offered in fee simple in parcels at said sale.

The appellant demurred to said motion, and the demurrer was overruled. He filed an answer in denial. He also filed his affidavit and motion for a change of venue from said county, which was refused.

The court at the hearing granted permission to the sheriff to correct his return as requested, and directed the clerk to amend the return as entered on the execution docket, in accordance with the amendment so made by the sheriff.

Appellant excepted to this order, and filed a motion for a new trial, which was overruled.

He has assigned as errors the overruling of his demurrer, the overruling of his motion for a change of venue, the overruling of his motion for a new trial, and the ordering and directing that the appellee Emmons should amend his return so as to show that the real estate was first offered in parcels before the sale thereof to the appellee Moudy.

This was a motion to permit the sheriff to amend his return after it had become matter of record, so that it might speak the whole truth. The parties to the judgment on which the execution issued, in whose names the motion was entitled, appeared. It was not a civil action, and the forming of issues of law and fact, and the trial thereof as in a civil action, were irregular. No such formal proceedings were necessary. No objection thereto was made. The application was a motion addressed to the discretion of the court, to be heard as a motion by the court in which the record to be amended was. The parties were not entitled to a trial by jury or to a change of venue.

It was a proceeding to correct a record, but not an application for an entry *nunc pro tunc*, or an amendment of an

Wilcox v. Moudy *et al.*

entry, relating to a judicial act which had been omitted from the record or incorrectly recorded through clerical misprision. The return is made by the sheriff, and he is responsible for it. The court can not correct it, as it may be the misprision of its clerk; nor can it order the sheriff to correct it. While the writ is in his control he may make or alter it to his own satisfaction. After he has filed his return, though it can only be corrected by him, it is a matter of record and can only be corrected by permission of the court, of whose records it forms a part; and this permission should be granted where the amendment will cause the return to speak the truth, and will be for the furtherance of justice, and has been properly asked.

That the court may exercise a sound discretion, it may be enlightened by any material and competent evidence, including oral evidence.

The evidence on the hearing clearly showed that, within the knowledge of the sheriff, the real estate was offered in fee simple in parcels, and that this fact was not stated in the return; and no reason against the allowance of the amendment was shown. There was no abuse of discretion in permitting the amendment of the return. Freeman Executions, secs. 358, 360, 388; Herman Executions, sec. 248; *New Albany, etc., R. R. Co. v. Laiman*, 8 Ind. 212; *New Albany, etc., R. R. Co. v. Grooms*, 9 Ind. 243; *Jackson v. Ohio, etc., R. R. Co.*, 15 Ind. 192; *Walter v. Palmer*, 18 Ind. 279; *Dwiggins v. Cook*, 71 Ind. 579; *Turner v. First Nat. Bank*, 78 Ind. 19; *Walker v. Shelbyville, etc., Co.*, 80 Ind. 452.

No question is made in regard to the portion of the order by which the clerk was directed to correct the entry in the execution docket, to make it conform to the amended return. This was a proper direction. The amended return furnished preceding matter of record by which to amend the entry. *Newhouse v. Martin*, 68 Ind. 224.

There is no error in the record.

PER CURIAM.—It is ordered, upon the foregoing opinion, that the judgment be affirmed, at appellant's costs.

Fassinow v. The State.

10,910.

FASSINOW v. THE STATE.

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135 235

JUDGE.—*Appointment Pro Tem.*—On the first day of the term a judge *pro tem.*, duly appointed, held the court. On the second day another judge *pro tem.*, appointed on that day, appeared and held the court, and did so for several days, the record during those days being silent as to the one first appointed. *Semblé*, the second appointee had due authority.

INTOXICATING LIQUOR.—*Gift on Sunday.*—*Evidence.*—*Witness.*—*Cross-Examination.*—Prosecution against a bartender at a drinking shop, for giving away liquors on Sunday in violation of section 2098, R. S. 1881. As a witness for himself the accused testified that he had orders from his employers, which he obeyed, not to do the thing charged.

Held, that he might be asked on cross-examination whether he had not done the same thing on other Sundays.

CRIMINAL LAW.—*Reasonable Doubt.*—*Jury.*—*Duty.*—*Instructions.*—Each juror should act for himself upon his individual convictions, and if, in a criminal case, he have a reasonable doubt of the defendant's guilt, he should not convict, but his doubts should not control the action of other jurors, and an instruction to that effect is proper.

From the White Circuit Court.

A. W. Reynolds and E. B. Sellers, for appellant.

F. T. Hord, Attorney General, R. Gregory, Prosecuting Attorney, and W. B. Hord, for the State.

ZOLLARS, J.—Appellant was indicted, tried and convicted on a charge of giving away, on Sunday, spirituous liquors to be drunk as a beverage, in violation of section 2098, R. S. 1881. The record shows that Judge Gould, the regular judge, being unable to preside at a part of the March term, 1883, of the court, appointed Judge Vinton to hold the court, until such time as the regular judge should be able to preside. This appointment was in writing, and was dated on the 17th day of March, 1883. On the 19th day of March, that being the first day of the term, Judge Vinton presented his written appointment, and it was properly recorded. On the second day of the term, being the 20th day of March, Hon. Robt. C. Gregory presented a written appointment as judge *pro tempore* of the court, which, with the proper oath, was properly recorded. This

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appointment was signed by Judge Gould and dated the 20th day of March. It is stated therein that Judge Gould was unable to preside at and during a part of the term, and that Hon. Robt. C. Gregory was appointed to preside, with full power to hear all cases, until such time as Judge Gould could attend and preside. On the ninth day of the term this cause was called for trial, when appellant objected "to the jurisdiction of the court over the person of the defendant, and the subject-matter," for the reason that Judge Vinton had been appointed, and held the first day of the term of the court. No exception seems to have been taken to the overruling of this objection. After verdict, appellant moved for a new trial. The sixth reason is that "the court had no jurisdiction over the person or cause." This motion was overruled, and appellant excepted. He then moved in arrest of judgment. The motion was overruled, and he excepted. These two rulings are the only errors assigned in this court. The argument of appellant's counsel is confined to the questions of the regularity and validity of the appointment of the Hon. Robt. C. Gregory, and to alleged errors of the trial court in allowing certain questions to be propounded to appellant on cross-examination, and the giving of an instruction by the court. We think that the first question is not properly presented by the record. We may say, however, that under the decisions in the cases of *State, ex rel., v. Murdock*, 86 Ind. 124, *Zonker v. Cowan*, 84 Ind. 395, *Feigel v. State*, 85 Ind. 580, and *Bowlus v. Brier*, 87 Ind. 391, Judge Gould, being unable to attend and hold his court, had power to appoint a judge *pro tempore*. The record being silent upon the point we must presume that Judge Vinton was unable to attend and preside longer than the first day of the term. Such being the case, Judge Gould clearly had authority to appoint the Hon. Robt. C. Gregory, and the court did not lose jurisdiction of the person of the defendant or the subject-matter of the action. *Hutts v. Hutts*, 51 Ind. 581; *Glenn v. State, ex rel.*, 46 Ind. 368; *Singleton v. Pidgeon*, 21 Ind. 118; *Cincinnati, etc., R. R. Co. v. Rowe*, 17 Ind. 568.

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The evidence shows that appellant was a bartender for the proprietors of a saloon in Monticello, White county. In his examination in chief he testified, substantially, that he had orders from his principals not to keep the saloon open, or sell or give away spirituous liquors, on Sunday, and that he had obeyed such orders. On cross-examination he was asked in several questions, substantially, if he had not, on Sundays other than the one named in the indictment, let parties in the saloon who got drinks. To these questions he objected, on the ground that they were not proper on cross-examination, and were irrelevant, improper and unlawful. We think that the questions were proper on cross-examination. It is said in argument that these questions were improper, because the State had no right, in the support of the charge in the indictment, to prove other offences. The record does not show that they were asked for this purpose, and appellant did not object to them upon this ground. If he wished to avoid such questions, he should not have gone into the subject himself, in his testimony in chief; and, besides, his answers were not such as to do him serious injury.

The following instruction, given by the court, is complained of by appellant: "Each juror acts for himself in coming to a conclusion, and acts on his own convictions; and, although it is true that in case any one of the jurors entertains a reasonable doubt as to the guilt of the defendant, he ought not to find the defendant guilty, yet such doubt in the mind of one or more of the jurors ought not to control the action of the other jurors, so as to compel them to give a verdict of acquittal."

The objection urged against this instruction is, that, upon request of appellant, proper instructions upon the question of reasonable doubt had been given, and that those set out should not have been given, for the reason that the jury were told therein that if a part of them believed the defendant guilty, and others believed him not guilty, there could be no verdict. We are unable to see any objection to the instruc-

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tion, and think there was no error in giving it. It clearly comes within the rule laid down in the case of *Castle v. State*, 75 Ind. 146.

As we find no available error in the record, the judgment of the court below is affirmed, at the costs of appellant.

No. 10,061.

CARTER ET AL. v. CLARK ET AL.

GRAVEL ROADS.—Use of Highway.—County Commissioners.—A grant by the county commissioners, to a gravel road company, to occupy and use a public highway for its gravel road, confers the right to make such excavations thereon as may be necessary in the grading of its road.

From the Fountain Circuit Court.

J. McCabe, C. M. McCabe and E. F. McCabe, for appellants.
M. Milford, for appellees.

ELLIOTT, J.—The appellants' complaint seeks the review of a judgment rendered on a demurrer to a complaint in an action instituted by them against the appellees.

The contention of appellants' counsel is that a grant by county commissioners, to a private gravel road corporation, of the right to occupy and use a public highway for a gravel road, does not confer authority to dig into or disturb the surface of the ground occupied by the public road. We are of a different opinion. The grant by the county commissioners confers the easement owned by the county, and this embraces the right to improve and use the granted roadway for highway purposes. It would nullify the statute, to hold that the grantee of the county does not take a right to make a gravel road out of the public highway. In granting a principal power, all incidental ones are impliedly conferred, and the grant of the commissioners necessarily implies the right to construct a gravel road and to do all reasonable things necessary to effectuate that object.

Carter *et al.* v. Clark *et al.*

The conclusion which we have reached is not in conflict with the ruling in *Turner v. Rising Sun, etc., Co.*, 71 Ind. 547, for the reason that the complaint sought to be reviewed does not show any appropriation of soil, nor any injury to appellants' property. The only allegation upon this point is this: "And said supposed directors are now commencing to plow up and destroy said highway, preparatory to grading and gravelling the same, and are threatening to do so on those portions of the highway passing over and upon the lands of the plaintiffs." This is far from showing any appropriation of appellants' property or any injury to it. No more is shown than what might be reasonably presumed necessary to construct such a gravel road as the law requires. The grant for a gravel road necessarily implies the right to make such changes in the surface of the highway as will make it fit for the purposes for which the statute intended the corporation should take it. If any other rule be adopted than the one stated, it necessarily results in holding that the private corporation can do nothing at all with the easement granted it by the commissioners under statutory authority. The statute forbids such a conclusion, for it declares that the granted highway "shall be and become the property of said company for the purpose of making and maintaining said road and the toll-gates and toll-houses thereon." Sec. 3628, R. S. 1881.

It is well settled that no additional burden is imposed by changing a public highway into a toll road. The change is not in the character of the servitude, but in the mode of sustaining the highway; in the one case it is sustained by taxes, in the other by tolls. *Benedict v. Goit*, 3 Barb. 459; *Walker v. Caywood*, 31 N. Y. 51; *Wright v. Carter*, 27 N. J. L. 76; *Douglass v. Boonsborough, etc., Co.*, 22 Md. 219; *Callison v. Hedrick*, 15 Grat. 244; *Nolensville, etc., Co. v. Baker*, 4 Humph. 314; *Panton, etc., Co. v. Bishop*, 11 Vt. 198; *Chagrin Falls, etc., Co. v. Cane*, 2 Ohio St. 419.

Judgment affirmed.

Gordon v. Stockdale.

No. 8852.

GORDON v. STOCKDALE.

SPECIAL VERDICT.—*Finding.*—*Evidence.*—A special verdict should find facts and not merely evidence of them, so that the law will irresistibly infer a certain result; but it need not find a conclusion which the law affixes to the facts found.

LANDLORD AND TENANT.—*Contract.*—*Growing Crops.*—*Ownership.*—*Possession.*—*Special Finding.*—*Verdict.*—*Conclusions of Law.*—It was found that A. planted a field of wheat under a written contract, which was set out. This contract gave A. possession of the crop, required him to harvest and thresh it, and deliver one-half of it to the landlord, and in express terms provided that each should own one-half.

Held, that these facts compelled the conclusion, as one of law, that A. was owner of half the wheat, and, therefore, the verdict, which did not find such ownership in terms, was not defective.

CONVERSION.—*Evidence.*—The exercise of dominion over the goods of another, and excluding him therefrom, in defiance of his rights, constitute in law a conversion, and not merely evidence of it.

From the Elkhart Circuit Court.

J. M. Vanfleet and E. C. Bickel, for appellant.

J. H. Baker and J. A. S. Mitchell, for appellee.

MORRIS, C.—The appellee brought this suit against the appellant. The complaint contains two paragraphs.

The first paragraph of the complaint states that the appellee was, on the 1st day of July, 1879, the owner of the undivided one-half of thirty acres of wheat then growing upon certain real estate in Elkhart county, Indiana; that, being the owner of said wheat, he undertook to enter upon said real estate, then in possession of the appellant, to harvest the same, he having planted said wheat as a tenant; that the appellant unlawfully and forcibly excluded the appellee from the land on which the same was growing, and took and converted the wheat to his own use.

The second paragraph of the complaint states that the appellee was the owner of 200 bushels of wheat, and entitled to the possession of the same, of the value of \$300, then in the possession of the appellant; that on the 21st day of Novem-

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89	840
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Gordon v. Stockdale.

ber, 1879, the appellee demanded the possession of said wheat, but the appellant refused to surrender said wheat, and has since converted it to his own use, to the damage of the appellee in the sum of \$300. Wherefore he sues, etc.

The appellant appeared and answered the complaint by a general denial.

The cause was submitted to a jury for trial, who returned a special verdict as follows: "We, the jury, find the following special verdict:

"*First.* We find that on the 11th day of January, 1878, Louisa J. Chapman was the owner of a farm known as the 'Alcorn farm,' described in the first paragraph of the complaint.

"*Second.* We further find that on the 1st day of January, 1878, the plaintiff took possession of said farm, under a contract made with Henry T. Chapman, the husband of said Louisa J., which contract was afterwards, in pursuance of the agreement then made, reduced to writing and signed, on the 15th day of April, 1878, a correct copy of which is made a part of this finding, and hereto attached, marked 'A.'

"*Third.* We further find that while said Stockdale was in possession of said farm, under said contract, he sowed about eighteen acres of land on said farm in wheat.

"*Fourth.* We further find that on the — day of —, 1878, said Louisa J. Chapman and her husband joined in a conveyance of said farm by deed of general warranty, in the statutory form, to Mrs. Gordon, wife of defendant, said deed containing no reservation of said wheat to the grantors or either of them, said Chapman and wife having sold to said Mrs. Gordon all their right and title to said farm, and to the crops growing thereon, and sold or undertook to sell Stockdale's share of said wheat to said Gordon, the defendant and the said Mrs. Gordon both having knowledge of the plaintiff's possession and contract.

"*Fifth.* We find that when said wheat was ripe and fit to harvest, the plaintiff, Stockdale, went on to said farm and de-

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manded of the defendant the right to harvest and thresh the same, but that the defendant had taken possession of said wheat and excluded the plaintiff therefrom, and refused to permit him to harvest and thresh the same, and that said defendant, without the consent of the plaintiff, took possession of, harvested and threshed said wheat, said crop yielding 333 bushels, all of which the defendant took into his possession and has ever since held and now has.

"Sixth. We further find that before the beginning of this suit, to wit, on the 21st day of November, 1879, the plaintiff again demanded of the defendant his (plaintiff's) share of said wheat, which the defendant refused.

"Seventh. We further find that said wheat was worth, in market, on the day it was last demanded, \$1.30 per bushel.

"Eighth. We further find that the plaintiff, Stockdale, was not in any manner indebted to the defendant, Gordon, or his wife, Mrs. Gordon, at the time said Gordon took possession of said wheat, nor at the time of the commencement of this suit, nor when said wheat was demanded.

"Ninth. We further find that the plaintiff, Stockdale, is not in any manner indebted to H. P. Chapman under said contract, or to his wife, Louisa J. Chapman, and was not when said wheat was taken into the possession of the said defendant, nor when the same was demanded of him, nor at the commencement of this suit.

"On the foregoing facts, if the law be with the plaintiff, we find for the plaintiff in the sum of \$216.45, and assess his damages at \$15; and if the law be with the defendant we find for the defendant."

The copy of the agreement attached to the verdict is as follows:

"Memorandum of an agreement made this 18th day of April, 1878, between Henry P. Chapman, first party, and Thomas J. Stockdale, second party, all of Elkhart county, State of Indiana, for the purpose of carrying on a farm and

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dairy business, on the farm known as the 'Alcorn farm'; said first party furnishes the farm and the expense of any new improvement, such as new fences, etc., which may become necessary; also, furnishes one team, wagon, all heavy farming implements, such as plows, harness, etc., and one-half the cows kept on the farm for dairy purposes; the said second party furnishes one-half the cows required to supply the demand for milk for dairy purposes, one team and wagon for selling milk, all the articles necessary to be used in taking care of and selling the dairy products, and all the small tools and implements for carrying on the farm, such as hoes, rakes, forks, etc., etc. Said second party further agrees to carry on said business at his own expense, and to do all seasonably and in a farmer-like manner; to keep an accurate account of milk and vegetable sales, with names of customers, and report the same as often as once a month to said first party, and at the same time pay over to said first party one-half the proceeds of the same. Said second party further agrees to keep up all repairs of fences and improvements, and other repairs about the place. All feed purchased for the dairy cows to be paid for out of the undivided proceeds of the milk sales. All other stock to be fed out of undivided crops raised on the farm. All the crops and products of the farm, including fruit and vegetables, to belong one-half to each party thereto. And said second party agrees to deliver the share of said first party to him, either in the city of Elkhart, or in a proper place on the farm, as said first party may desire. It is further agreed that said first party shall have a lien on all said second party's share of said crops and products for the security of his full claim on the proceeds of said business, and that said first party shall be entitled to the possession of the buildings and the lands not in crops, any time after October the 25th, 1878, at his option; and that, in case said second party shall fail or neglect to fulfil his part of this contract, said first party may at any time take possession of all the property belonging to him, and

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take and collect all outstanding milk accounts, accounting to said second party for one-half of the proceeds.

"H. P. CHAPMAN.

"T. J. STOCKDALE."

The plaintiff below remitted \$15, the damages found in his favor, and moved the court for judgment upon the verdict. The appellant, as the record states, interposed a motion for judgment in his favor. The court, without further notice of the appellant's motion, rendered judgment in favor of the appellee for \$216.45 and costs, to which the appellant excepted. This is the only exception in the record, and the rendering of judgment for the appellee is properly assigned as error.

The appellant insists that the verdict does not find that appellee was the owner of the wheat in controversy, as alleged in the complaint. The appellee contends that the verdict finds facts from which the conclusion of ownership necessarily follows as matter of law.

The jury do not find directly and in so many words, that the wheat belonged to the appellee, but they do find that he sowed the wheat as tenant, under a contract which gave the one-half of it to him, and the right to the possession of the whole of it for the purpose of harvesting, threshing and dividing it.

It is not claimed by the appellant in argument that the contract between the appellee and Henry P. Chapman was not made with the consent of Mrs. Chapman; but, as claimed by the appellee, it seems to be conceded that the contract was valid and binding upon her, and upon the parties to it. Assuming, in view of this concession on the part of the appellant, that Henry P. Chapman was authorized by Mrs. Chapman to make the contract returned with and as a part of the verdict, we think it quite clear that the facts found show that the appellee was the owner of one-half the wheat growing on the "Alcorn farm," and entitled to the possession of the whole of it until harvested and threshed. The contract gave him the right to harvest and thresh the wheat, and by its express

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terms he was the owner of one-half of it. The conclusion of law upon the facts thus found is, that the appellee owned one-half the wheat, and was entitled to the possession of the whole of it for the purpose of harvesting, threshing and dividing it. The appellant says that the ownership is not found otherwise than by inference. That may be true; but the inference is a legal conclusion which results irresistibly from the facts found.

It is also argued by the appellant that the contract made Chapman and the appellant partners. The contract, as to the wheat, provides otherwise. It expressly declares that each shall own one-half the wheat.

It is also contended by the appellant that the jury have not found a conversion of the wheat by him; that they have only found facts which operate as evidence of a conversion; that a demand and refusal are evidence of conversion, but not conclusive of the fact of conversion. This is true, and had the jury found nothing more than this, the judgment could not be justified. *Locke v. Merchants Nat. Bank*, 66 Ind. 353. But the jury also found that the defendant took possession of the growing wheat, excluded the appellee from it, harvested and threshed it, and refused to deliver any part of it, upon demand, to the appellee. The acts amounted to a conversion of the wheat, and not merely to evidence of a conversion of it. Taking possession of the wheat and cutting and threshing it were acts of dominion wrongfully exerted over the property in dispute, in defiance of the rights of the appellee, and amounted to a conversion of it. If, as the verdict finds, the appellant exercised dominion over the wheat, in exclusion or in defiance of the appellee's rights, this, in law, was a conversion. *Cooley Torts*, 448; *Thompson v. Currier*, 24 N. H. 237; *Shaw v. Peckett*, 25 Vt. 423. We think there is no error in the record.

PER CURIAM.—It is ordered, upon the foregoing opinion, that the judgment below be affirmed, at the costs of the appellant.

Boots, Administrator, v. Griffith, Administrator.

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No. 10,208.

BOOTS, ADMINISTRATOR, v. GRIFFITH, ADMINISTRATOR.

PRACTICE.—*Admission of Evidence.—Cause for New Trial.—Supreme Court.*

The admission of improper evidence is an error of law occurring at the trial, and must be assigned as such in the motion for a new trial, to present any question for the decision of the Supreme Court.

DECEDENTS' ESTATES.—*Trial of Claim.—Interrogatories to Jury.—Instructions.*

—Under section 2325, R. S. 1881, the trial of a claim against a decedent's estate is to be conducted as the trial of an ordinary civil cause, and therefore it is proper for the court, on the trial of such a claim by a jury, to instruct them at the request of either party, if they render a general verdict, to find specially upon particular questions of fact to be stated in writing. In such case an exception to such instruction will present no objection to either the form or substance of any interrogatory.

HUSBAND AND WIFE.—*Earnings of Wife.—Sole Property of Wife.*—Under section 5130, R. S. 1881, the earnings and profits of a wife, accruing from her trade, business, services or labor, other than labor for her husband and family, are her sole and separate property, and the common law rule to the contrary is superseded and abrogated.

From the Montgomery Circuit Court.

M. Thompson, W. H. Thompson, J. E. McDonald, J. M. Butler and A. L. Mason, for appellant.

G. W. Paul and J. E. Humphries, for appellee.

Howk, J.—Patrick McGrath and Margaret McGrath were husband and wife. Patrick died, and his widow, Margaret, filed this claim against her husband's estate, and then she died. The appellant, as the administrator of Margaret's estate, prosecuted such claim against Patrick's estate. The cause was put at issue and tried by a jury, and a general verdict was returned for the appellee, the defendant below. Over the appellant's motion for a new trial, the court rendered judgment against him for appellee's costs.

Error is assigned by appellant upon the overruling of his motion for a new trial, in which motion the following causes were assigned for such new trial, to wit:

1. The verdict was contrary to law, and was not sustained by sufficient evidence; and,

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2. Error of the court in giving the jury instructions numbered one and six, and in requiring the jury to answer certain interrogatories, at appellee's request.

The first point made by the appellant's counsel in argument is, that the trial court erred in the admission of certain evidence offered by appellee, over appellant's objection and exception. This was an error of law, if it be an error, occurring at the trial, and as such it ought to have been assigned as cause for a new trial, in the motion therefor. It was not so assigned; and, therefore, under the settled practice of this court, it must be held that the error is not before us, and no question is thereby presented for our decision. *Leary v. Ebert*, 72 Ind. 418; *Warner v. Curran*, 75 Ind. 309; *Stockwell v. Thomas*, 76 Ind. 506.

Appellant's counsel next complain, in their brief of this cause, of the sixth instruction of the court to the jury, and of the action of the court in requiring the jury to answer certain interrogatories, at the appellee's request. In the sixth instruction the court told the jury in substance, that when a cause was tried by a jury either party might require the jury, in case they agreed upon a general verdict, to find specially upon particular questions of fact, to be stated in writing; that a general verdict was a verdict upon the issues, either for the plaintiff or for the defendant; and that the appellee had asked that in case the jury agreed upon a general verdict, they should find specially upon particular questions of fact, which were stated in writing. The record shows that this instruction was given and excepted to. Appellant's counsel have not pointed out any objections, and we can see none, either to the form or substance of this instruction. This cause was tried below on the 2d day of December, 1881. In sec. 2325, R. S. 1881, in force at the time, it is provided that the trial of a claim against a decedent's estate "shall be conducted as in ordinary civil cases;" and in sec. 546, R. S. 1881, it is provided that the court "in all cases, when requested by either party, shall instruct them," (the jury) "if they render a general verdict, to find specially upon

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particular questions of fact, to be stated in writing." It does not appear from the record that the appellant pointed out to the trial court any specific objection to any of the interrogatories, or that he there moved to reject or strike out any of them. He is in no condition, therefore, as it seems to us, to complain here of any of the interrogatories. Certainly, his exception to the instruction of the court in reference to the interrogatories will not present any question for our decision concerning the sufficiency, in form or substance, of any of the interrogatories. *Brooker v. Weber*, 41 Ind. 426.

Instruction 1 reads as follows: "Any money that the decedent, Margaret McGrath, made by her own labor, while the wife of Patrick McGrath, belonged to Patrick McGrath, unless there was an express contract between them that her earnings should be her separate property. The earnings of Margaret McGrath were the property of Patrick McGrath just as much as were the earnings of his own hands."

Appellant's counsel earnestly insist that the court erred in giving this instruction to the jury, *first*, because it did not contain a correct statement of the law, and *secondly*, because, if it stated the law correctly, it was not applicable to the case in hand. Counsel are right, we think, in their views of the instruction. At common law the earnings of the wife belonged to the husband. *Yopst v. Yopst*, 51 Ind. 61, and cases cited. But this common law rule was superseded in this State by the act of March 25th, 1879, concerning married women, which became a law on May 31st, 1879. In sec. 2 of this act it was provided that "The earnings and profits of any married woman, accruing from her trade, business, services, or labor, other than labor for her husband or family, shall be her sole and separate property." Acts 1879, p. 160; sec. 5130, R. S. 1881. This statutory provision was the law of this State in relation to the wife's earnings during the time covered by the instruction of the court, between May 31st, 1879, and the 18th day of March, 1880; on which latter day the record shows that

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Patrick McGrath died. It is manifest, therefore, that the instruction did not contain a correct statement of the law.

But, aside from this, we are of opinion that the instruction was wholly inapplicable to the case at bar, and that its tendency was to mislead the jury. The suit was not brought to recover the personal earnings of the wife, or money made by her labor; but it was brought to recover moneys advanced or loaned by the wife to her husband, in his lifetime, which moneys were the rents or earnings of the wife's separate real estate. For the reason stated we think that the court erred in giving the instruction above quoted, and that, for this error of law, a new trial ought to have been granted.

The appellee has assigned as cross errors the refusal of the court to give the jury certain instructions, at his request; and his counsel ask this court to decide the questions thereby presented. These cross errors are, however, merely causes for a new trial. As such they are not proper assignments of error or cross error, and present no question for our decision. *Cole v. Kidd*, 80 Ind. 563.

The judgment is reversed, with costs, and the cause is remanded with instructions to sustain the motion for a new trial, and for further proceedings not inconsistent with this opinion.

Opinion filed at the November term, 1882.

Petition for a rehearing overruled at the May term, 1883.

No. 10,569.

89	249
150	440

HON v. THE STATE, EX REL. HOTTEL ET AL.

Town.—School Trustees.—Township Trustee.—School Fund.—Mandate.—Relator.—Where money has been apportioned to a school township and received by the trustee thereof, some of which belongs to a school town afterwards organized, and he refuses to pay it over, he may be compelled by mandate to do so, and the school trustees of the town are the proper relators in such a suit.

Hon v. The State, *ex rel.* Hottel *et al.*

SAME.—*Organization of Corporation.*—The regularity of the organization of the town as a corporation can not be questioned in such a proceeding, nor is it necessary to prove more (if anything on that subject) than the exercise of corporate functions.

PRACTICE.—*Error.*—The sufficiency of a reply can not be questioned for the first time in the Supreme Court, but objections thereto must be properly presented to the trial court.

From the Washington Circuit Court.

H. Heffren and J. A. Zaring, for appellant.

S. B. Voyles, H. Morris and J. Dailey, for appellees.

ELLIOTT, J.—The relators aver that they are the school trustees of the town of Fredericksburgh, and that the appellant is the trustee of the township in which the town is situated; that he has received money belonging to the school fund and apportioned to the township, and that the school corporation represented by the relators is entitled to a part thereof. A writ of mandate is prayed.

We have no doubt that in such a case as that made by the complaint of appellee's relators, mandamus is the appropriate remedy. Where a public officer has funds to which another officer is entitled, mandamus will lie to compel the payment of the money to the proper officer. In such a case, it is the specific legal duty of the custodian of the fund to pay it to the officer entitled to receive it, and mandamus will lie to enforce the performance of such a duty.

Where the facts pleaded show that the only adequate remedy is that of mandamus, there is no necessity for averring, in terms, that there is no other legal remedy. The facts stated control, and if they show that there is no other remedy, the direct averment is needless; if they show that there is such a remedy, the averment is without force.

The trustees of the school corporation of a town are the proper relators, in an action to recover money belonging to the school fund of the town represented by them. It is sufficient to describe them as school trustees of the town, and the description of their official character is not bad because

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it fails to state that they are trustees of the school town. The distinction attempted to be drawn by appellant is without support in reason or authority. *Mackenzie v. Board, etc.*, 72 Ind. 189.

Where the township trustee receives money which belongs to the school town and refuses to pay it over, he may be sued, and there is no necessity for joining any person with him as a party defendant. He, and not the school corporation, is the wrong-doer.

Where the school trustees of a town are elected after money has been received by the trustee of the township, they become, upon proper qualification, entitled to the money allotted by law to the school town, and it is the duty of the trustee, on demand, to pay it over to them. The right of the township trustee to the custody of the money terminates with the due organization of the board of school trustees for the incorporated town. *Johnson v. Smith*, 64 Ind. 275.

The complaint shows a right to some of the school funds in the hands of the appellant, and, therefore, shows a right to some relief, and where a complaint shows a right to some relief, it is strong enough to withstand a demurrer. *Bayless v. Glenn*, 72 Ind. 5.

The question of the regularity of the incorporation of the town of Fredericksburgh can not be tried in such an action as this. Such a question can only be tried in a proceeding in the nature of a *quo warranto*, directly attacking the corporate organization.

The sufficiency of a reply can not be brought in question by an assignment of errors; there must be objection properly presented to the trial court.

It was not necessary for appellees to prove that all the steps required by law for the incorporation of the town of Fredericksburgh had been taken, for they made out a case when it was shown that there had been an attempt to organize according to law; that there was an assumption of corporate existence and the exercise of corporate functions.

Peed *et al.* v. Brenneman *et al.*

This was all, and, perhaps, more than the appellees were required to show. *Williamson v. Kokomo, etc., Ass'n, post*, p. 389, Whether a *de facto* corporation has a legal right to existence is a question to be tried in a proceeding instituted on behalf of the State.

The third reason for a new trial is not so framed as to present any question for review.

Judgment affirmed.

No. 10,274.

PEED ET AL. v. BRENNEMAN ET AL.

PRACTICE.—Open and Close.—Burden of Issue.—On appeal from proceedings before a board of commissioners in reference to the location of a highway, where the remonstrance, having been amended in the circuit court, is for damages only, the remonstrant is entitled to open and close, because he has the burden of the issue.

From the Henry Circuit Court.

J. H. Mellett, E. H. Bundy, D. W. Chambers, J. S. Hedges and *W. O. Barnard*, for appellants.

W. Grose, J. M. Brown, J. Brown and *W. A. Brown*, for appellees.

ZOLLARS, J.—The facts presented by the record, so far as it is necessary to state them, are as follows: Appellees presented a petition to the board of commissioners of Henry county, asking for the location and establishment of a highway. Viewers were appointed, and reported that the proposed highway would be of public utility.

Following this appellants remonstrated, on the grounds of inutility, and damages to them respectively. Reviewers were appointed, who reported damages in favor of appellants, and that the highway would not be of public utility. After the filing of this report, the board of commissioners refused to grant the prayer of the petition, and made an order accord-

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ingly. From this order the petitioners appealed to the circuit court. In that court appellants dismissed their remonstrance as to all allegations and issues except their respective claims for damages, as set forth therein.

Before any testimony was introduced appellants asked and claimed the right to open and close the cause. After the close of the testimony, and before argument, appellants claimed the right, and asked the privilege of opening and closing the argument to the jury.

These demands were denied by the court, and the open and close, both in the testimony and argument, were awarded to the petitioners for the highway, appellees. To these rulings of the court appellants objected and excepted, and assign them as causes for a new trial.

The motion for a new trial was overruled, appellants excepted, brought the case to this court on appeal, and have assigned for error the overruling of the motion for a new trial. It is well settled by a long line of decisions by this court, that in these highway proceedings all objections not made before the board of commissioners are regarded as having been waived. *Smith v. Alexander*, 24 Ind. 454; *Cummins v. Shields*, 34 Ind. 154; *Daggy v. Coats*, 19 Ind. 259; *Fisher v. Hobbs*, 42 Ind. 276; *Sowle v. Cosner*, 56 Ind. 276; *Turley v. Oldham*, 68 Ind. 114. It is settled by these cases, and others that might be cited, that if no remonstrance is filed before the board of commissioners, challenging the public utility of the proposed highway, that will be taken as admitted, and no longer in issue before the board, or in the circuit court on appeal. In the recent and well considered case of *Green v. Elliott*, 86 Ind. 53, the question of the proper practice in this class of cases was examined, and it was held that the matters to be litigated on appeal are those litigated before the board of commissioners. See also the case of *Breitweiser v. Fuhrman*, 88 Ind. 28.

It is settled by these cases, also, that if, in a case like this, there is no remonstrance before the board of commissioners

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on the ground of inutility, no proof will be required from the petitioners on that subject in the circuit court. If the remonstrance is based upon a claim of damages alone, the amount of such damages will be the only issue to be tried on appeal. In this case the remonstrance was double, putting in issue the question of public utility, and claiming damages; but, as we have seen, appellants dismissed their remonstrance as to all questions except damages. This dismissal carried with it out of the record so much of the report of the reviewers as found against the public utility of the highway, and left the case as though the remonstrance had been limited in the first instance to the question of damages. The only question at issue between the parties was as to whether or not appellants were entitled to damages, and if so, how much. Of that issue appellants had the affirmative, and the burden was upon them to establish it by a preponderance of testimony. It follows, therefore, that they were entitled to the open and close, both in the testimony and argument, and that the court below erred in denying them that right. R. S. 1881, sec. 536; *Hamlyn v. Nesbit*, 37 Ind. 284; *Evansville, etc., R. R. Co. v. Miller*, 30 Ind. 209; *Baltimore, etc., R. R. Co. v. McWhinney*, 36 Ind. 436, 444; *Grand Rapids, etc., R. R. Co. v. Horn*, 41 Ind. 479; *Fetters v. Muncie Nat. Bank*, 34 Ind. 251 (7 Am. R. 225).

It is claimed by counsel for appellee that this question is not presented by the record, because no time was asked or granted to file a bill of exceptions at the time the court refused to give appellants the open and close of the case. As we have said, this refusal was made a cause for a new trial. When the motion for a new trial was overruled, sixty days time was granted within which to prepare and file a bill of exceptions. The bill was presented to the judge within that time. For the purpose of examination, he held the bill beyond the sixty days. The statute provides that when a decision excepted to is properly assigned as a reason for a new trial, such motion shall carry such decision and exception forward to the time of ruling on such motion, and time may be then

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given by the court, within which to reduce such exceptions to writing ; and that if the bill be presented to the judge within the time granted, his delay in signing and filing the same shall not deprive the party objecting of the benefit thereof. R. S. 1881, secs. 625 and 629.

Other questions are discussed by counsel, but, as they are not very fully and fairly presented by the record, if at all, and may not all be important in another trial, we do not think it necessary to notice them further. Some of these questions are undergoing an examination in other cases before this court and will probably be decided before a second trial of this cause. Others have already been decided. See *Hagaman v. Moore*, 84 Ind. 496.

By reason of the error already pointed out, the judgment is reversed, at the costs of appellees.

89	255
127	413
89	255
165	152

No. 10,906.

POINTER v. THE STATE.

CRIMINAL LAW.—Indictment.—Pleas in Abatement.—Defects and irregularities not apparent on the face of the indictment must be pleaded in abatement.

SAME.—Pleas in Abatement and Bar.—Waiver.—Pleas in abatement must be pleaded and disposed of before a plea in bar is interposed; by pleading in bar all matters of abatement are waived.

SAME.—Grand Jury.—New Trial.—Irregularity in the proceedings before the grand jury which found the indictment is not cause for a new trial; so, also, the fact that the defendant had no opportunity to challenge grand jurors. The former might be pleaded in abatement, but the latter could not.

From the Perry Circuit Court.

C. H. Mason, for appellant.

F. T. Hord, Attorney General, and *S. B. Hatfield*, Prosecuting Attorney, for the State.

NIBLACK, C. J.—This was a prosecution against the appell-

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lant, Henry Pointer, upon an indictment for grand larceny, charging him with having stolen \$18 in money, the property of one Harry Clark.

Plea of not guilty; verdict finding the defendant guilty as charged, and fixing his punishment, in addition to a fine and disfranchisement, at imprisonment in the State's prison for the term of one year. Motion for a new trial denied, and judgment on the verdict.

The defendant assigned as causes for a new trial:

First. Irregularity in the proceedings in this, that the grand jury which found the indictment, in violation of law and in disregard of the rights of the appellant, had him brought before it, and caused and coerced him to be sworn and examined as a witness against himself, the examination having been conducted by the prosecuting witness, a person not occupying any official position, and in an unusually abrupt and intimidating manner, thus procuring the indictment to be found and returned by irregular and unlawful means, and without sufficient evidence obtained in a lawful way.

Second. That the appellant, when the grand jury was empanelled and sworn, was confined in the county jail, without counsel, and had no opportunity of challenging any member of such jury as, under the law, he had a right to do.

Third. Permitting the prosecuting witness to testify as to the conduct and admissions of the appellant when before the grand jury, at the time and under the circumstances above stated.

Fourth. That the verdict was not sustained by sufficient evidence.

Fifth. That the verdict was contrary to law.

The first and second causes so assigned were supported by the affidavit of the appellant. Error is only assigned upon the overruling of the motion for a new trial.

All defects and irregularities pertaining to the indictment, and not apparent upon the face of it, but involved in the proceedings, and yet not affecting the substantial merits of the

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charge, must be pleaded in abatement. Pleas in abatement must be pleaded and disposed of before a plea in bar is interposed. Bicknell Crim. Prac. 113; Moore Crim. Law, section 270; Reinhard Crim. Law, 362.

Where a person under indictment has had no opportunity of challenging the grand jury, he may plead in abatement any matter which would have been sufficient cause of challenge to that tribunal or any member of it. *Mershon v. State*, 51 Ind. 14; *Meiers v. State*, 56 Ind. 336; *Sater v. State*, 56 Ind. 378; *Miller v. State*, 69 Ind. 284.

The questions attempted to be presented by the first and second causes for a new trial could, therefore, only have been raised by pleading them in abatement, and by pleading in bar all matters in abatement were waived. Moore, *supra*, section 270. It is, nevertheless, no ground for a plea in abatement, that the indictment was found without evidence, or without sufficient evidence, or that no vote was taken by the grand jury on the indictment. *Stewart v. State*, 24 Ind. 142; *Creek v. State*, 24 Ind. 151.

The bill of exceptions fails to sustain the third cause assigned for a new trial; on the contrary, it is made to appear by that instrument, that the prosecuting witness was not permitted to repeat what the appellant testified to before the grand jury, or to make any statement as to what occurred in the grand jury room which could have been construed as injurious to the appellant.

All the evidence relied upon to connect the appellant with the larceny was circumstantial merely, but, unfortunately for the appellant, all the evidence so relied upon apparently tended in but one direction, and that was to a conclusion inconsistent with his innocence.

It can not, consequently, be held that there was not sufficient evidence to sustain the verdict, or that the verdict was contrary to law.

The judgment is affirmed, with costs.

The Continental Life Insurance Company *v.* Houser.

No. 9617.

THE CONTINENTAL LIFE INSURANCE COMPANY *v.* HOUSER.

PLEADING.—*Uncertainty.*—*Demurrer.*—Mere uncertainty in a pleading can not be reached by demurrer.

LIFE INSURANCE.—*Forfeiture.*—*Fraud.*—*Contract.*—*Performance.*—*Complaint.*—*Premiums.*—A complaint, in an action to recover premiums paid on a forfeited life insurance policy, alleged that a life policy had been assigned to the plaintiff with the approval of the insurance company. The premiums were to be \$155 per annum, payable quarterly, and were so paid for six years, when the plaintiff, being ready to pay, could find no agent of the defendant, at the usual place, to receive the money, and the defendant then declared the policy forfeited for non-payment of that premium. It was offered the next day to an agent elsewhere. There was no averment that the plaintiff had performed the conditions of the contract, nor what such conditions were.

Held, on demurrer, that the complaint was insufficient.

Held, also, that if fraud in declaring the policy forfeited was relied on, the facts constituting it should have been alleged.

Held, also, that where a risk attaches premiums paid during its continuance can not be recovered back.

From the Vigo Circuit Court.

J. Buchanan, for appellant.

W. Eggleston and *E. Reed*, for appellee.

ELLIOTT, J.—The third paragraph of the appellee's complaint is, substantially, the ordinary count for money had and received, and, although badly drawn and lacking in certainty, is sufficient on demurrer. The remedy for a pleading defective in point of certainty is a motion to make more definite and certain.

The fourth paragraph alleges that, on the 23d day of December, 1872, one William Hesse received from appellant a policy of insurance on the life of his mother, Louise Hesse, payable to himself; that the premium was \$155 per annum, payable in four instalments; that on the 4th of July, 1873, William Hesse assigned the policy to appellee; that the assignment was approved by appellant; that, to quote from the complaint, “by reason of the assignment, the plaintiff agreed

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to pay annually at the times specified the premiums on the policy ;" that she did pay them according to its terms until April, 1878 ; that the amount paid by her was \$750 ; that after the assignment appellant's agents always notified her of the time of payment of the premiums ; that appellant was a non-resident corporation, and that all premiums were paid at the city of Terre Haute, in this State ; that on the 23d day of April, 1878, she was ready and willing to pay the premium that then became due, and made diligent search for the agent at the city above named, but found none ; that on the next day she ascertained that the appellant had an agent at Indianapolis, and sent the premium to him ; that the appellant, to again quote from the complaint, "for the purpose of defrauding the plaintiff and cheating her out of her money at the said time, to wit, on the 23d day of April, 1878, declared her said policy forfeited for the non-payment of the premium aforesaid, and refused to receive the quarterly premium then due on said policy, and to give her a receipt therefor, and has ever since so refused to do." The prayer is for a cancellation of the policy and for judgment for \$1,000.

It is not easy to determine upon what theory the paragraph is constructed, but counsel on both sides treat it as a complaint for the recovery of the premiums paid by the appellee. We do not think the paragraph good for any purpose or upon any theory.

There is no averment of performance of the conditions of the contract on the part of the assured ; nor, indeed, is there any statement of the terms or conditions of the contract. For any thing that appears, the appellant may have had an undoubted right to forfeit the policy. The averment, that the forfeiture was declared for the purpose of defrauding appellant, amounts to nothing. If fraud was relied on, the facts constituting it should have been alleged ; epithets can not fill the place of facts.

Where a plaintiff grounds a right of action upon a breach of such a contract, he must show performance on his part and a wrongful refusal or failure to perform on the part of his ad-

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versary. It is not enough to show non-performance, for there may be non-performance without a breach. In order to make a good complaint in such an action as this, the plaintiff must show the terms and conditions of the contract, performance on his part, and a failure or refusal to perform on the part of the other party, constituting a breach of the contract. There is nothing in the complaint before us showing that the refusal to perform was not fully justified by the terms of the policy.

The policy was valid in its inception, and there was for a time a risk, and the general rule is that where the risk attaches premiums can not be recovered from the company. Bliss Life Ins. 750; May Ins., section 567. If there was a continuing valid risk up to the time the last premium was tendered and refused, then the premiums previously paid can not be recovered. May Ins., sections 568 and 569. If, however, the act of the appellant in declaring a forfeiture was wrongful, then there must be a remedy. We do not feel called upon to decide whether the remedy would be a reinstatement of the policy or an action for its value, for the complaint is insufficient in any view that may be taken of the question. *Day v. Connecticut, etc., Ins. Co.*, 45 Conn. 480 (29 Am. R. 693).

Judgment reversed.

89 200
197 208

No. 10,805.

THE STATE, EX REL. MARTIN ET AL., *v.* PORTER, GOVERNOR,
ET AL.

CONSTITUTIONAL LAW.—*Appropriation of Money.—Auditor of State.—Treasurer of State.*—Under section 3 of article 10 of the State Constitution of 1851 (sec. 195, R. S. 1881), no money can be drawn from the State treasury except in pursuance of appropriations made by law; and, under section 5639, R. S. 1881, the Auditor of State is prohibited from drawing a warrant, and in section 5638, R. S. 1881, the Treasurer of State is expressly prohibited from paying a warrant, unless there be money actually in the treasury specifically appropriated by law to the purpose for which such warrant is drawn.

The State, *ex rel.* Martin *et al.*, v. Porter, Governor, *et al.*

MANDATE.—Justice of Claim.—The justice of the relator's claim, which is apparent and unquestioned, does not authorize the courts to require by mandate the Auditor of State to issue his warrant, or the Treasurer of State to pay such warrant, for the amount of such claim, where no money is set apart for such purpose by an appropriation made by law.

SAME.—Appropriation for Future Purposes.—Antecedent Debt.—The act of February 23d, 1883, making specific appropriations for the completion and furnishing of the department for women of the Indiana Hospital for the Insane, and for the construction of a warehouse and two coal-houses for such institution (Acts 1883, p. 25), makes appropriations for future purposes, and the moneys thereby appropriated can not be diverted from such future purposes and applied to the payment of an antecedent debt of such institution.

From the Superior Court of Marion County.

E. B. Martindale, C. Martindale, J. E. McDonald and J. M. Butler, for appellants.

F. T. Hord, Attorney General, for appellees.

HOWK, J.—We take from the brief of the appellant's counsel in this cause the following summary of the relators' verified complaint:

By an act of the General Assembly, approved March 11th, 1875, the "Commissioners for the Indiana Hospital for the Insane, provisional board," were empowered "to locate, construct, furnish, equip and open for the reception of insane persons, buildings" to be "known and designated as the Indiana Hospital for the Insane, department for women," and to contract for the necessary work and to pay for the same "by warrants directed to the Auditor of State," bearing "the signature of the president and secretary of the board, and countersigned by the supervisor of construction;" that in pursuance of the provisions of said act the said provisional board, on the 4th day of June, 1875, entered into a contract with the relator, John Martin, whereby Martin agreed to perform all the labor and furnish all the material in the construction of the brick work of said building, for the sum of \$9 per thousand, "mason's measurement"; that Martin gave bond in the sum of \$400,000 for the faithful performance of his part of the contract; that he performed his part of the contract

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faithfully and well, and his work was approved, accepted and commended by the supervisor of construction and said board; that he was paid for his work from month to month on approximate estimates made by the architect, and that on the 2d day of November, 1881, said board, having measured said brick work in full, found that there was a balance due said Martin of \$46,736.46, and issued to him their warrant for said amount, directed to the Auditor of State, signed by the president and secretary, and countersigned by the supervisor of construction, in manner and form according to the statute defining the powers and duties of the board, a copy of which warrant is set out in the complaint; that there yet remains about \$2,700 worth of work to be done under said contract in the completion of the building; that at the time of the issuance of said warrant payment of the same was demanded of the auditor, who refused to pay the same, for the reason that there was no money in the fund for the erection and construction of said building; that Martin, being indebted to the Bank of Commerce in the sum of \$22,000, assigned said warrant to said bank as collateral security for the payment of said indebtedness; that by an act approved February 23d, 1883, the General Assembly appropriated to the fund for the construction of said building the sum of \$42,000; that on the 6th day of March, 1883, the relators demanded of the Auditor of State a warrant upon the Treasurer of State for the amount of money then in said fund, in partial payment of their warrant from the provisional board, which he refused to give them; whereupon they filed their complaint and prayed a mandate against the Auditor of State, commanding him to draw his warrant in favor of the relators for the amount of money in the fund for the construction of the said building, and a mandate against the Treasurer of State, commanding him to pay said warrant of the Auditor of State, when so issued, and asking a restraining order and temporary injunction until the rights of the relators could be heard and determined.

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Upon the relators' verified complaint an alternative writ of mandate was issued, directed to the appellees, to which they appeared; and their motions to quash the writ and their demurrers thereto having been overruled by the court, they severally made return, by answers in several paragraphs, to such alternative writ. The demurrers of the relators, for the alleged want of facts, to the second, third, fourth, fifth, sixth, eighth and ninth paragraphs of the separate answer and return of the Auditor of State, and to the second, third and fourth paragraphs of the separate answer and return of the Treasurer of State, and to the separate answer and return of the "provisional board," were severally overruled to the separate paragraphs of such answers and returns, and were carried back and sustained by the court to the verified complaint and alternative writ. The relators duly excepted to each of these rulings, and declined to amend or plead further; and thereupon judgment was rendered by the court, at special term, that they take nothing by their suit herein, and that the appellees recover their costs. On appeal to the general term the judgment at special term was affirmed; and from the judgment of affirmance the appellant's relators now prosecute this appeal to this court.

In the general term of the court below, the appellant's relators assigned as errors the several rulings of the court, at special term, on their demurrers to the several paragraphs of the separate answers and returns of the appellees; and these errors they have brought before this court, by a proper assignment of error.

The appellant's relators were and are the holders of a certificate, of which the following is a copy:

"No. 985. INDIANAPOLIS, Ind., Nov. 2d, 1881.

"The State of Indiana, on account of the Hospital for the Insane, department for women.

"TO THE AUDITOR OF STATE:

"This is to certify, that by an order of the commissioners for the Indiana Hospital for the Insane, provisional board,

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this day made, it is found that there is due John Martin from the State of Indiana, for material furnished and work performed to this date, under his contract with said board dated June 4th, 1875, the sum of forty-six thousand, seven hundred and thirty-six dollars and forty-six cents (46,736.46).

"The Auditor of State is therefore authorized to issue to John Martin, his executors, administrators or assigns, a warrant on the Treasurer of State for said sum of \$46,736.46, whenever an appropriation shall be made by the General Assembly of the State of Indiana, for the purpose of paying the same. This warrant being issued by order of said provisional board, in pursuance of section 13 of the act of the General Assembly of the State of Indiana, approved March 11th, 1875. In witness whereof," etc.

This certificate or warrant was duly signed, attested and certified by the proper officers of the provisional board and the superintendent of construction.

It was not alleged in the relators' verified complaint or in the alternative writ of mandate, that an appropriation had been made by the General Assembly of this State, for the specific purpose of paying the certificate or warrant, issued by the provisional board to the relator John Martin. On the other hand, the substance of the appellees' defence to the relators' suit was that the General Assembly had never made an appropriation for the purpose of paying such certificate or warrant. The third paragraph of the answer or return of the Auditor of State was, in substance, as follows:

Third. That no money can be paid out of the State Treasury except upon appropriation duly and lawfully made by the General Assembly of the State of Indiana; that defendant, as the Auditor of said State, could not lawfully draw his warrant upon the State Treasury for the payment of relators' claim, or any part thereof, unless an appropriation had been specifically made for the payment of the same by the General Assembly, and the defendant avers that the said provisional board allowed the said claim of relators upon a compromise

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with said Martin, and on the express condition that the same was not to be paid until the General Assembly of the State of Indiana made a specific appropriation for the payment thereof, and said allowance and said condition were duly and properly spread upon the records of the said provisional board ; and, thereafter, said relator John Martin, while the sole owner of said claim, accepted and received said allowance upon said terms and conditions, as prescribed by said board, and defendant avers that the General Assembly of the State of Indiana had not, at the time of the demand by the relators, on defendant, to issue a warrant for said indebtedness to them, nor prior thereto or since, made any appropriation, by law or otherwise, for the payment of said indebtedness, or any part thereof. Defendant charges and avers that there was not, at the time of said demand, and there is not now, any fund in the State Treasury upon which the defendant was or is authorized to draw his warrant for the payment of the said debt of relators, or any part thereof; that after examination of said claim defendant refused to draw said warrant, in good faith, honestly, and without malice toward relators, or either of them, but in the just and honest performance and exercise of his official duties, and defendant demands judgment.

At the last session of the General Assembly of this State, an act was passed and duly approved on the 23d day of February, 1883. This act is entitled and reads as follows :

"An Act making appropriations for the completion of the construction and furnishing of the department for women of the Indiana Hospital for the Insane, and for the construction of a warehouse and two coal-houses for said institution, and declaring an emergency.

[APPROVED FEBRUARY 23, 1883.]

" WHEREAS, The number of insane persons who have a constitutional right to be cared for by the State is largely in excess of the present capacity of the hospital for the insane ; and,

" WHEREAS, The completion of the department for women of said hospital will secure an increase of capacity for more than two hundred more inmates ; and,

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"WHEREAS, The hospital has no provision for the convenient, safe, and economical storage of subsistence, supplies and coal, and thereby suffers waste and spoilage of its property, and exposure and damage to its employees and inmates; therefore,

"SECTION 1. *Be it enacted by the General Assembly of the State of Indiana,* That for the following purposes the following sums of money are hereby now appropriated from the general fund of the State Treasury, to wit:

"1. For the completion of the construction of the department for women of the Indiana Hospital for the Insane, forty-two thousand dollars.

"2. For the completion of the furnishing of said department, ten thousand dollars.

"3. For the construction of a warehouse for said hospital, five thousand dollars.

"4. For the construction of a coal-house for each of the two departments of said hospital, two thousand and five hundred dollars.

"SEC. 2. That of these several sums appropriated, that for the completion of the construction of the department for women shall be solely subject to the control of the commissioners of the Indiana Hospital for the Insane, department for women, provisional board, subject to existing laws defining the powers and duties of said board.

"SEC. 3. That all other sums by this act appropriated shall be used only by the trustees of the Indiana Hospital for the Insane, and only for the purposes set forth, subject to the laws defining the powers and duties of said trustees.

"SEC. 4. That there being an emergent need for the immediate operation of this act, the same shall be in force from and after its passage."

In their verified complaint, and in the alternative writ, the appellant's relators claimed that the moneys appropriated in and by this act were applicable to the payment of the certificate or warrant issued as aforesaid by the provisional board

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to the relator Martin ; and the object of their suits seems to be to compel the appellees by mandate to divert the moneys appropriated from the purposes expressed in the act, and to apply such moneys in payment of their certificate or warrant. It seems to us that the controlling question in this case may be thus stated : Have the relators any valid claim to the moneys appropriated in the above quoted act, or can such moneys be lawfully applied to any other purpose than those expressed in the act ? Other questions have been presented and ably discussed by the learned counsel of the respective parties ; but if the question stated must be answered, as we think it must, in the negative, such answer will be decisive of the case at bar against the appellant's relators.

In section 3, of article 10, of the Constitution of this State of 1851, it is expressly declared as follows : " No money shall be drawn from the treasury but in pursuance of appropriations made by law." R. S. 1881, section 195. In section 5639, R. S. 1881, in force since August 6th, 1859, it is provided as follows : " The Auditor of State shall, at no time, draw a warrant upon the Treasurer of State unless there be money in the Treasury belonging to the fund upon which the same is drawn to pay the same, and in conformity to appropriations made by law, and on money actually in the Treasury, subject to the payment of the same." In the preceding section 5638, R. S. 1881, " The Treasurer of State is expressly prohibited from paying any money out of, or transferring any money from, the Treasury of State, except upon the warrant of the Auditor of State." In *State, ex rel., v. Ristine, Auditor*, 20 Ind. 345, after quoting these statutory provisions, the court said : " It is evident that the provisions, thus quoted, contemplated two things : 1. To carry into full effect the section of the Constitution above quoted ; and 2. To create, or at least maintain a strict system of checks upon each other in the Auditor's and Treasurer's offices, in regard to the moneys of the people entrusted to the care of said officers."

In their brief of this case the relators' counsel say : " Three

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questions arise upon the complaint and determine its sufficiency, viz.:

"First. Have the relators a valid, liquidated indebtedness?

"Second. Is their warrant payable only by a specific appropriation, made therefor by the General Assembly?

"Third. Is the appropriation, made by the act of February 23d, 1883, applicable to its payment?"

With reference to the first of these questions, it will suffice to say that the appellees have not, in any manner, called in question the validity of the warrant issued by the provisional board to the relator John Martin. It may be assumed, therefore, in this case, that such warrant evidenced "a valid, liquidated indebtedness," in favor of the relators.

2. We are of opinion, however, that the relators' warrant, like all similar claims against the State, is payable only by or out of a specific appropriation, made for that purpose by the General Assembly. It was alleged by the relators, in their verified complaint and in the alternative writ, and it is conceded by their counsel in argument, "that, at the time such warrant was issued, the appropriations had been exhausted, and there was no money in the Treasury for the payment of the warrant." Since the issue of such warrant, on the 2d day of November, 1881, there has only been one session of the General Assembly of this State, to wit, the regular session, 1883. At this last session only one act was passed and became a law, making appropriations for the benefit or use of the existing Indiana Hospital for the Insane, and that is the act heretofore set out in this opinion. Relators' counsel conclude their argument, on their second question above quoted, with this statement: "We think the conclusion is irresistible that this warrant is not limited to payment by a specific appropriation by the General Assembly, but is payable out of any money *generally* appropriated for the construction of the building." There is, perhaps, a slight confusion of terms in this language of counsel. If the General As-

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sembly had made an appropriation "for the construction of the building" of the Indiana Hospital for the Insane, it would certainly have been a *specific* appropriation to that end, and if the relators' warrant would have been payable out of the money so appropriated, it would certainly have been payable out of such *specific* appropriation. But, however this may be, it is absolutely certain, we think, that, since the issue of the relators' warrant by the provisional board, there has not been, and is not now, "any money *generally* appropriated for the construction of the building" of the Indiana Hospital for the Insane, out of which such warrant is payable, or can be lawfully paid.

3. We come now to the consideration of the *third* question above quoted, as stated by the relators' counsel, namely: "Is the appropriation made by the act of February 23d, 1883, applicable to the payment" of the relators' warrant? We are of opinion that this question must be answered in the negative. In clear, plain and unambiguous language, the act makes four certain and specific appropriations, for four well defined and clearly expressed purposes; and the payment of the relators' warrant, or of any prior or outstanding indebtedness, does not come within any of such purposes. In the preamble of the act the reasons are plainly expressed for making each of such appropriations; and the payment of the relators' warrant, or of any other antecedent debt, is not one of such reasons. The appropriations were manifestly made for future purposes, and not for past transactions. The intention and purpose of the General Assembly in making the several appropriations are clearly shown in the title, the preamble and the body of the act. The language used is so plain in its meaning, as it seems to us, that judicial construction or interpretation is wholly unnecessary. There are no technical words or phrases in the act under consideration; and, giving the words used "their plain, or ordinary and usual sense," as required by the first rule for the construction of statutes (R.

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S. 1881, sec. 240), we can not hold that "the appropriation made by the act of February 23d, 1883, is applicable to the payment of the relators' warrant."

Our conclusion is, therefore, that the facts stated by the relators, in their verified complaint and in the alternative writ, were not sufficient to constitute a cause of action, or to entitle them to any relief as against the appellees. The relators' demurrers for the want of facts to the several paragraphs of the separate answers of the appellees were properly carried back and sustained by the court to the complaint and alternative writ. In such a case it is immaterial whether the paragraphs of answer were good or bad, because a bad answer is a good enough answer to a bad complaint. *Etna Ins. Co. v. Baker*, 71 Ind. 102.

We have found no error in the record of this cause which would authorize or require the reversal of the judgment.

The judgment is affirmed, at the costs of the appellant's relators.

No. 9647.

JOHNSON ET AL. v. McCULLOCH ET AL.

PRACTICE.—*New Trial.*—A motion by a defendant for a new trial, upon "his paragraphs of counter-claim and set-off," though they were the only pleadings upon which issues were made, raises no question. The motion should be for a new trial generally.

SAME.—*Exceptions.*—An exception to two or more rulings in gross reserves no question.

From the Whitley Circuit Court.

C. Clemans and A. C. Clemans, for appellants.

W. H. Withers and W. P. Breen, for appellees.

FRANKLIN, C.—Appellee McCulloch sued appellant Johnson on two notes, and for the foreclosure of a mortgage against Johnson and wife and appellee Taylor, making the wife and

89	<u>270</u>
130	<u>100</u>
89	270
137	168
138	548
89	<u>270</u>
156	<u>421</u>
89	270
150	330

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Taylor parties defendants, alleging that Taylor claimed to hold a prior mortgage upon the same premises, and asking that he be required to answer as to his interest therein. Taylor filed a cross complaint against appellee McCulloch and Johnson and wife, asking to have his mortgage foreclosed against all the other parties, and that it be decreed a prior lien to the plaintiff's mortgage.

Process was issued and served upon Johnson and wife, and the wife was defaulted. Johnson separately answered the plaintiff's complaint and the defendant Taylor's cross complaint by general denials, and by special paragraphs by way of counter-claim and set-off. They each replied by denying the special paragraphs.

The venue was changed from the Allen Circuit Court to the Whitley Circuit Court, on the application of appellant, where appellant withdrew his general denial to the complaint and to Taylor's cross complaint, and filed offers to confess judgment in favor of each for about half the amount claimed, and costs to date, which offers were refused; and the cause was submitted to a jury for trial.

There was a verdict returned for appellee McCulloch for the full amount of his claim and the foreclosure of his mortgage against all the defendants, but declaring his mortgage lien junior to that of Taylor; and for the defendant Taylor for the full amount of his claim, and a foreclosure of his mortgage against all the other parties, and declaring his mortgage lien prior to that of McCulloch.

Appellant separately moved for new trials as to his paragraphs of counter-claim and set-off, which motions were respectively overruled, and an exception was reserved. Errors have been assigned in this court upon said rulings only.

It is insisted by appellees' counsel that the overruling of these motions presents no question for the consideration of this court; that a party who seeks a new trial, in order to be successful, must seek it as to the whole case; that the court could not grant a new trial as to a part of the case only; and

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in support thereof we are referred to the case of *Morris v. State*, 1 Blackf. 37, where the rule was stated to be that "he who desires a new trial must receive it as to the whole case." This rule has been followed in the cases of *Mills v. State*, 52 Ind. 187; *Veatch v. State*, 60 Ind. 291; *Ex parte Bradley*, 48 Ind. 548. It was also held in the case last referred to that the granting of a new trial placed the parties in the same position as if no trial had ever been had. The same rule is declared in the case of *Richter v. Koster*, 45 Ind. 440.

In the case of *Houston v. Bruner*, 39 Ind. 376, it was held that the rights of parties liable on a promissory note may be settled, as between themselves, in an action against them by the holder of the note, and a new trial may be granted upon this issue; but the plaintiff in the action on the note will not be delayed thereby, but may proceed to collect his judgment against the parties liable to him. In that case the issue between the defendants was not connected with or affected by their liability to the plaintiff, but his rights were finally settled and remained the same after the granting of a new trial upon that issue, as though no new trial had been granted. In the case at bar it is different; the plaintiff's judgment here was dependent upon the issue on defendant's answer by way of counter-claim and set-off, and the granting of a new trial as to that issue would necessarily require the granting of a new trial as to the whole case, and for which no such motion was made. As to the issue between the defendants, the defendant Taylor became plaintiff in his cross complaint, and the defendant Johnson occupied the same position toward him that he did toward McCulloch, the original plaintiff in the case, for Taylor's success depended as much upon the issue on appellant's answer of counter-claim as did the plaintiff's; and appellant could be no more entitled to a new trial upon this issue as against Taylor than he would have been entitled to a new trial on the similar issue as against the plaintiff.

Appellees' counsel further insist that the exceptions were not properly made and reserved.

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The record shows that there were two separate motions made, one making the plaintiff a party, and the other making the defendant Taylor a party; that they were decided separately; that no exception was taken until after they were both decided, and then the exception was taken jointly to both decisions.

The bill of exceptions states the taking of the exception as follows: "And thereupon the court, upon the same day, overruled the said motions of the defendant for a new trial as against McCulloch and Taylor in the above cause, and to which rulings the defendant excepted and still excepts."

In the case of *Leyner v. State*, 8 Ind. 490, the following language is used: "There is a fatal defect in the form of the bill of exceptions which might have been relied upon in brief, without noticing the errors assigned. After stating several rulings of the court in succession, the bill proceeds, 'To which said acts of the court in, etc., the defendant objects, and excepts, etc.' Exceptions are not to be thus taken in gross to several rulings: the exception must be taken to each ruling as it arises on the trial." See sections 626 and 628, R. S. 1881.

According to the code and the foregoing decision, the exceptions in this case were not properly made and entered of record or presented by bill of exceptions. No question is properly presented on the motions for new trials; there was no error in overruling them as made.

The judgment ought to be affirmed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment of the court below be and it is in all things affirmed, with costs.

Cleveland *v.* Obenchain.

No. 10,359.

CLEVELAND *v.* OBENCHAIN.

SURVEY.—Appeal.—Practice.—Pleadings in the circuit court, on appeal from a survey by a county surveyor, are unnecessary and inappropriate.

SAME.—Judgment on Appeal.—If in such case the survey be found incorrect, the court may order a re-survey and appoint a competent person to make it (R. S. 1881, section 5955), but it is error to direct him how to make it.

From the Whitley Circuit Court.

J. W. Adair, T. R. Marshall and W. F. McNagny, for appellant.

M. Sickafoose and W. Olds, for appellee.

BICKNELL, C. C.—Obenchain appealed from a survey made by Roscoe A. Kaufman, a county surveyor. Upon such an appeal the substantial question is, was the survey right? The cause is properly triable in the circuit court in the same manner as an appeal from a justice of the peace. *Findley v. McCormick*, 50 Ind. 19; *Ricketts v. Dorrell*, 59 Ind. 427. If the court shall decide that the survey was wrong, it shall enter an order for a re-survey, and shall designate a competent person to make it, and an appeal may be taken from the re-survey. R. S. 1881, section 5955. The re-survey need not be reported to the court, and the court has nothing to do with the re-survey except upon an appeal taken therefrom.

When Obenchain's appeal came before the court, he filed three exceptions to the survey. Cleveland moved to strike out the first two of the exceptions, and this motion was overruled. Cleveland then filed a demurrer to the exceptions collectively, "for want of facts sufficient to constitute a cause of action or right of appeal." This demurrer was overruled: Cleveland then pleaded to the exceptions the general denial, treating them as a complaint. The exceptions, the demurrer and the answer to the exceptions were all unnecessary and inappropriate, but these irregularities seem to have done no harm, because the real question, to wit, was the survey correct? was submitted to and was determined by the court.

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The court found that the survey was not correct, ordered a re-survey, appointed A. T. S. Kist to make it, and adjudged costs against Cleveland. This the court had a right to do; but the court included in its judgment a direction to its appointee to make the Osceola and Rochester State road the dividing line between the parties. This the court was not authorized to do; its only power under the statute, section 5955, *supra*, was to order the re-survey and appoint a person to make it.

The record shows that to this finding and form of order Cleveland at the time excepted. Further proceedings were had, the result of which was that a re-survey, made by Kist, in pursuance of the directions of the court, was by the court found to be correct. Cleveland appealed. Among the errors assigned is the following:

2. The court erred in its finding and form of order to A. T. S. Kist to re-survey the land in controversy.

For this error the judgment should be reversed.

PER CURIAM.—It is therefore ordered, on the foregoing opinion, that the judgment of the court below be and it is hereby in all things reversed, at the costs of the appellee, and this cause is remanded, with instructions to the court below to set aside said re-survey and all the proceedings subsequent to the finding of the court against the first survey, and upon that finding to appoint a surveyor to make a re-survey pursuant to the statute.

No. 10,824.

MOREL v. THE STATE.

INTOXICATING LIQUORS.—Sale on Sunday.—Drunk as a Beverage.—Indictment or Information.—Evidence and Defence.—In a prosecution for the unlawful sale of intoxicating liquor, under section 2098, R. S. 1881, upon Sunday or upon either of the other days named in such section, the indictment or information must charge, to be sufficient, that the sale of

89	275
143	688
89	275
144	363
89	275
151	679
89	275
154	583
89	275
162	301
89	275
170	632

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the intoxicating liquor was made "to be drunk as a beverage;" but where the evidence shows the sale, on either of the days named, of an intoxicating liquor which is ordinarily drunk as a beverage, and the defendant claims that it was not sold to be drunk as a beverage, this is matter of defence to be shown by him, and, in the absence of such showing, the court or jury will be justified in finding him guilty of the offence charged.

SAME.—*Cause for New Trial.—Newly-Discovered Evidence.—Contradiction or Impeachment of Witness.*—Where newly-discovered evidence is assigned as cause for a new trial, and it is apparent from the affidavits filed in support of such cause, that the only purpose of such evidence is to contradict and impeach the testimony of a witness on the previous trial, there is no error in the refusal of the court to grant a new trial for the introduction of such evidence.

SAME.—*Accident or Surprise.—Diligence.—New Trial.*—In a prosecution for the unlawful sale of intoxicating liquor to a certain person, on a certain Sunday, the defendant has no right to be surprised at the evidence of such person, tending to prove such sale; and such surprise, where no diligence whatever is shown, is not sufficient cause for a new trial.

From the Wayne Circuit Court.

S. A. Forkner and T. J. Study, for appellant.

F. T. Hord, Attorney General, and C. E. Shireley, for the State.

Howk, J.—The indictment in this case charged in substance, that the appellant and one Adolph Brown, in Wayne county, on the 3d day of September, 1882, unlawfully sold to George Dobbins, for the price of five cents, in a less quantity than a quart at a time, to be then and there drank as a beverage, a certain intoxicating liquor, to wit, one pint of beer, the said 3d day of September being then and there the first day of the week, commonly called Sunday. On the appellant's waiver of arraignment and plea of not guilty, the issues joined were tried by a jury; and a verdict was returned finding him guilty as charged, and assessing his fine in the sum of \$50. Over his motion for a new trial, judgment was rendered on the verdict.

The overruling of his motion for a new trial is assigned as error by the appellant. The appellant was charged in the

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indictment with an offence which is defined, and its punishment prescribed, in section 2098, R. S. 1881. So far as applicable to the case in hand, this section provides as follows: "Whoever shall sell, barter, or give away to be drunk as a beverage, any spirituous, vinous, malt or other intoxicating liquor, upon Sunday, * * * * shall be fined in any sum not more than fifty dollars nor less than ten dollars, to which may be added imprisonment in the county jail not more than sixty days nor less than ten days."

The first point made in argument by the appellant's counsel is the failure of the evidence, as counsel claim, to show a sale of intoxicating liquor "to be drunk as a beverage." In *Dowdell v. State*, 58 Ind. 333, in construing a statute almost identical, in its terms and verbiage, with section 2098, R. S. 1881, it was held that an affidavit charging the defendant with the offence defined in such statute was not sufficient, because it did not charge that the intoxicating liquor was sold "to be drunk as a beverage." The case cited was approved and followed by this court in the later case of *Allman v. State*, 69 Ind. 387. If it be necessary to the sufficiency of an indictment or information, charging the offence defined in section 2098, R. S. 1881, that it should aver that the intoxicating liquor was sold to be drunk as a beverage, of course the evidence should be such as to satisfy the jury that the liquor was sold for such purpose, or at least that it was not sold for any other purpose. The law makes the sale of intoxicating liquor on Sunday, and the other days named in the statute, to be drunk as a beverage, a public offence; but where the indictment or information charges, and the evidence shows, a sale by the defendant, on either of the days named in the statute, of an intoxicating liquor which is ordinarily used as a beverage, if the defendant claims that the liquor was not sold "to be drunk as a beverage," this is matter of defence to be shown by him, and, in the absence of such showing, he may well be found guilty of the offence charged by the triers of the facts. In the case at bar the State's evidence tended to

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prove a sale by the appellant, at his saloon, of ten cents' worth of beer, on a certain Sunday ; that the beer was intoxicating ; and that it was "drunk as a beverage." There was no evidence introduced, although the appellant testified as a witness, tending to prove that the beer was sold for any other purpose than to be drunk as a beverage. Upon the evidence the jury were justified, we think, in finding that the beer was sold by the appellant to be drunk as a beverage, and for no other purpose.

On the trial of the cause the court instructed the jury as follows :

"If the evidence convinces you beyond a reasonable doubt that on Sunday, the 3d day of September, 1882, or any Sunday prior to that, within two years prior to the finding of this indictment, said defendant was a keeper of a saloon in this city, where intoxicating liquors were sold, and had a person in his employ who assisted in the sale of such liquors, and if you further believe from the evidence, beyond a reasonable doubt, that on any one of the above named Sundays, George Dobbins authorized his son to buy any quantity of intoxicating beer for him, and if, in pursuance of said authority, his said son on any of said Sundays went to said saloon and told said defendant that his father wanted to buy a dime's worth of beer, that said defendant thereupon told said son to go to his bar-keeper, and if thereupon said son went to said bar-keeper, and if said bar-keeper gave to the said boy a dime's worth of intoxicating beer, and received from said boy a dime in payment therefor, and if said beer was then taken by said boy to his father, George Dobbins, and if said George Dobbins then drank said beer, or a portion thereof, as a beverage, you would be warranted in finding the defendant guilty ; but if these facts have not been proved beyond a reasonable doubt, you should acquit the defendant."

It is earnestly insisted by appellant's counsel that "this instruction is erroneous, and does not correctly state the law." Counsel say : "It ignores the all-important fact and essential ingredient requisite to constitute a sale of liquor illegal, un-

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der said section, namely: that it must be sold to be drunk as a beverage. If sold for this purpose, on the forbidden days named in said section, the crime by such sale is consummated, irrespective of the use which may afterwards be made of the liquor; and if the liquor is not sold to be drunk as a beverage, no subsequent use which may afterwards be made of the liquor sold, even though the purchaser may have drunk it as a beverage, can render the sale of the liquor illegal, and the seller criminally liable, under said section." We do not think that the appellant has any just cause to complain of the instruction of the court. It seems to us that the court might well have told the jury if they found the facts recited in the instruction, beyond a reasonable doubt, they must find the defendant guilty, unless they also found that the intoxicating beer had *not* been sold to be drunk as a beverage, and that this was matter of defence to be shown by the defendant. In the absence of such a showing by the appellant, we are of opinion that the instruction complained of was as favorable to him as the law would warrant, and that, in giving such instruction, the court committed no error of which he can be heard to complain.

Appellant's counsel next insist that a new trial ought to have been granted on account of certain newly-discovered evidence material for the appellant, which, it is claimed, he could not, with reasonable diligence, have discovered and produced at the trial. The only purpose which would be subserved or accomplished by the newly-discovered evidence on a new trial of the cause would have been the contradiction of the evidence of the infant son of George Dobbins, a witness for the State, on the question of the time of day he purchased the beer, and the possible impeachment of such witness, by showing that his evidence was false. It is well settled by the decisions of this court, "that a new trial will not be granted for the admission of newly-discovered evidence to contradict or impeach the testimony of a witness on a previous trial, either by showing that the reputation of such witness was bad

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for truth, or that his testimony on the former trial was false." *Shirel v. Baxter*, 71 Ind. 352. *Martin v. Garver*, 40 Ind. 351; *Evans v. State*, 67 Ind. 68; *Wall v. State, ex rel.*, 80 Ind. 146.

Accident and surprise, which ordinary prudence on his part could not have guarded against, are also assigned by appellant as cause for a new trial. It is claimed that the appellant was taken by surprise by the evidence of the boy Dobbins, to the effect that when he called on appellant for the beer the latter directed him to go to the barkeeper for it; and that he could not then remember where he was at the time spoken of by the boy, although he knew that he was not at his saloon; but that he now remembered and could prove where and with whom he was at the time. The appellant had no right to be surprised at any evidence introduced by the State in support of the charge in the indictment. The unlawful sale was charged to have been made on Sunday, the 3d day of September, 1882, in an indictment returned on the 14th day of September. There were but two Sundays in the month, therefore, about which he had to refresh his memory. As the trial of the cause did not occur until the 12th day of December, 1882, he certainly had an abundance of time before the trial to refresh his recollection and make proper inquiries in regard to where he was, and with whom, on each of the two Sundays in September, before the return of the indictment. We are of the opinion that the affidavits filed by appellant with his motion for a new trial fail to show that he could not, by proper and reasonable diligence, have discovered and produced at the trial his alleged newly-discovered evidence, or that he could not, by the exercise of ordinary prudence on his part, have guarded against the accident and surprise of which he complains.

Our conclusion is that the court committed no error in overruling the appellant's motion for a new trial.

The judgment is affirmed, with costs.

Babb *v.* Babb.

No. 10,455.

BABB *v.* BABB.

SUPREME COURT.—*Instructions.*—*Evidence.*—Where the evidence is not in the record, instructions, which might be correct under evidence which could have been properly admitted, will be upheld in the Supreme Court.

DEMAND.—*Sale.*—*Ratification.*—Where A. without authority sells B.'s property, and the latter ratifies the sale, he can not maintain a suit for the money received without a previous demand therefor.

From the Shelby Circuit Court.

J. B. McFadden and E. S. Stilwell, for appellant.

O. J. Glessner, E. K. Adams and L. J. Hackney, for appellee.

ELLIOTT, J.—The questions in this case arise upon the ruling denying appellant a new trial. Two instructions given by the court are said to be erroneous. The evidence is not in the record, and if, therefore, the instructions were correct upon any supposable case that might have been made, under the issues, by the evidence, we must affirm. As to one of them, the first of the two assailed, it is plain, that when read as it should be, in connection with the other instructions upon the same subject, it is a correct statement of the law, and we dismiss it without further remark.

The complaint alleges that George Babb, without right, sold a horse belonging to the appellant to the appellee; that the latter subsequently sold it to one Tomlinson, and received \$100 for it; that appellant afterwards informed appellee of her ownership, that the horse was wrongfully sold, and demanded the \$100 which he had received. Issue was made by a general denial. The second of the two instructions complained of reads thus: “It was necessary that the plaintiff should demand the \$100 sued for before bringing this suit, and you must determine whether such demand was made and defendant refused to comply. It would not be sufficient, if the plaintiff, by her attorney, James B. McFadden, only demanded possession of the horse.”

In ordinary cases, the owner of personal property can main-

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tain trover against one who wrongfully converts his property without a demand, for where there is a conversion there need be no demand. This rule, however, does not apply to this case. Here the owner does not sue for the conversion of the property, but, waiving the tort, sues as for money had and received. It is very easy to suppose evidence making such an instruction as that given entirely relevant and proper. It may well be that appellant had treated the appellee as her agent, and consented to the sale, and in such a case demand would be necessary; or it may be that the evidence showed a ratification of the sale, and in such a case the instruction would be proper. The allegations of the complaint go far to justify such suppositions. It alleges that she "demanded of the defendant payment for said filly in the sum of \$100, the same being the amount received by the defendant from the said Tomlinson as aforesaid."

Judgment affirmed.

No. 10,954.

HOTTENDORF v. THE STATE.

INTOXICATING LIQUORS.—Sale as Medicine.—Statute Construed.—Section 5320, R. S. 1881, is not violated by selling less than a quart of intoxicating liquor without license, in good faith, for medicinal purposes, but prudence and caution are required of the seller.

SAME.—Evidence.—As to the evidence sufficient to sustain a finding that intoxicating liquor was sold unlawfully and not for medicinal purposes, see opinion.

From the Wayne Circuit Court.

H. U. Johnson, for appellant.

F. T. Hord, Attorney General, and **C. E. Shiveley,** Prosecuting Attorney, for the State.

NIBLACK, C. J.—The appellant was indicted for selling without a license intoxicating liquor, in a less quantity than a

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quart to one Wesley Stevens. R. S. 1881, section 5320. A jury returned a verdict of guilty as charged, assessing at the same time a fine against the appellant. Motion for a new trial refused, and judgment on the verdict.

The only complaint is that the court erred in overruling the motion for a new trial, because of the alleged insufficiency of the evidence to sustain the verdict.

The appellant was shown to be a physician, and to have been the proprietor of a drug store in the town of Dublin, in Wayne county, in this State. Stevens, the prosecuting witness, testified in chief, that he lived in the town of Dublin, above named, and that he bought whiskey of the appellant at his place of business in that town in the summer or fall of 1882; that the amount of whiskey purchased at the time was less than a quart, being in fact a half pint, for which he paid twenty-five cents; that he asked for a half pint of whiskey, and the appellant went and got it for him; that the appellant asked him if he wanted anything in it; that he, witness, asked the appellant what he wanted to put in it, to which he replied he would put some ginger in it; that he would have to medicate it for witness; that this was all that was said at the time.

On his cross-examination, the witness stated that he did not remember telling the appellant that he was sick or had pains in his stomach when he called for the whiskey; that he could not recall all that was said at the time; that, after saying he must medicate it, the appellant put something in the whiskey which he said was ginger; that he, witness, did not drink the whiskey at the appellant's drug store, but took it away with him in a flask.

On his re-direct examination this witness said that he was sick when he got the whiskey, but did not remember having a pain in his stomach or telling the appellant that he had.

The appellant was a witness on his own behalf, and concurred generally in the statements made by Stevens, but asserted in addition that when Stevens called for the whiskey

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he asked him if he was sick, to which Stevens replied that he was ; that he had pains and cramp in his stomach ; that Stevens looked as if he might be sick at the time ; that he, appellant, thought that some whiskey, heated with ginger, would cure him up again, and sold him the whiskey to relieve his pain or cramp in the stomach, believing that he needed it for that purpose ; that he told Stevens when he asked for the whiskey, that he would have to medicate it, believing that he would have to put medicine in it in order not to violate the law ; that he put an ounce of tincture of ginger in a half pint flask and filled up the flask with whiskey ; that he did not do this to violate the law ; that he did not examine Stevens, or feel his pulse, and Stevens had no prescription ; that he acted on Stevens's appearance only.

It is argued on behalf of the appellant that the evidence, a substantial synopsis of which is given as above, showed affirmatively, and without conflict as to that branch of the case, that the whiskey was sold for a medicinal purpose, and for that purpose only, in due course of business, at a drug store, and that, following the case of *Nixon v. State*, 76 Ind. 524, and other cases cited by it, a case of unlawful selling intoxicating liquor by retail, as charged in the indictment, was not made out against the appellant.

In construing statutes similar to section 5320, *supra*, this court has repeatedly held that a *bona fide* sale of intoxicating liquor for medicinal purposes was not prohibited by any of the penal provisions of the statutes so construed, and we regard that as the proper construction to be given to section 5320, herein referred to, which is really the same as section 12 of the act of March 17th, 1875, concerning the sale of intoxicating liquors, under which the case of *Nixon v. State*, *supra*, was decided.

As to whether a sale of intoxicating liquor was made for a medicinal purpose, is a question which must be determined upon the facts of each particular case, and concerning which

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no general principles can be made specially applicable, unless it be that in all such cases it ought to be shown that the person who made the sale acted with reasonable caution in making it.

In this case the question before the jury seems to have been whether the whiskey was really sold for medicinal purposes, or only colorably so. As bearing upon that question some of the facts and expressions brought out by the evidence were apparently unfavorable to the appellant's defence.

In the first place, the application for the whiskey was not accompanied by any suggestion from Stevens that he needed it as a medicine. In the next place, the remark of the appellant, after he had seemingly taken in the situation, that he would have to *medicate* the whiskey, carried with it the implication that there was something in the transaction to which, as a matter of prudent precaution, a coloring ought to be given different from that contemplated by Stevens when he called for whiskey, pure and simple. In the third place, the means which the appellant took to ascertain the physical condition of Stevens at the time of the sale of the whiskey were very slight indeed, and were not such as physicians usually take before either prescribing or administering medicine.

If Stevens was really in need of whiskey as a medicine, why the necessity of *medicating* it in order not to violate the law in selling it to him? What need is there of giving to a lawful transaction a coloring which implies a doubt of its legality?

With these facts before them, aided by the presence of the parties, who were also witnesses, as above shown, we can not say that the jury were not justified in coming to a conclusion adverse to the innocence of the appellant.

The judgment is affirmed, with costs.

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50	285
128	166
89	286
132	426

No. 10,928.

THE STATE v. WEIL ET AL.

CRIMINAL LAW.—*Imperfect Transcript.—Dismissal of Appeal.—Certiorari.*—In criminal law, as a general rule, the fact, though apparent, that the transcript is imperfect, affords no sufficient ground for the dismissal of the appeal; but in such case the remedy of the complaining party is by writ of certiorari, to correct the transcript.

SAME.—*Duplicity in Criminal Pleading.—Motion to Quash.*—In criminal pleading, there can be no joinder of separate and distinct offences in one and the same count. Where the information or indictment charges the defendant in a single count with two or more substantive offences, it is bad for duplicity, and the defendant's motion to quash the same should be sustained.

From the Montgomery Circuit Court.

F. T. Hord, Attorney General, F. M. Howard, Prosecuting Attorney, J. H. Burford, P. S. Kennedy and W. T. Brush, for the State.

A. D. Thomas, for appellees.

Hawk, J.—The first entry in the record of this cause shows that on the 27th day of September, 1882, before Melville W. Bruner, "heretofore appointed and sworn as judge *pro tem.* for the trial of this cause," comes the plaintiff and come the defendants, in person and by their attorneys; "and plaintiff files its amended affidavit and information, re-sworn to." When and how the prosecution was commenced, whether before a justice of the peace or in the circuit court, and what previous proceedings, if any, were had therein, and when and where, are matters not shown in or disclosed by the transcript before us. Nor does it appear from the record when, how or by whom, or for what cause, Melville W. Bruner was "heretofore appointed and sworn as judge *pro tem.* for the trial of this cause."

The record further shows that at the time of the filing of such amended affidavit and information, the defendants' motion to quash the same was overruled by the court, and their exception noted to such ruling.

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It does not appear from the record that any other step was taken in the cause until the 13th day of February, 1883, at which time, before the same special judge, the parties appeared as before, and the court, apparently of its own motion, then ordered that its former decision, overruling the defendants' motion to quash, be set aside. The court then sustained the defendants' motion to quash the amended affidavit and information, to which ruling the State excepted; and the court ordered that the defendants be discharged without day, to which order the State excepted and has appealed therefrom to this court.

Error is assigned here by the State upon the decision of the court in sustaining the appellees' motion to quash the affidavit and information.

The appellees have moved this court in writing "to dismiss the appeal herein for the reason, that, from the face of the transcript, it (the transcript) is not a complete one, this appeal not being upon a question reserved by the State, within the meaning of sec. 1883, R. S. 1881." We do not think that this motion is well taken or can be sustained. The record is manifestly imperfect and defective, but a motion to dismiss the appeal does not seem to us to be the proper method for disposing of an imperfect record. If any matter has been omitted from the transcript which prevents the appellees from properly presenting their side of the case for our consideration, they could readily procure such omitted matter to be supplied by an application for a writ of *certiorari*. It is claimed by the State that the court below erred in sustaining the appellees' motion to quash the affidavit and information; and this ruling is assigned as error and presents the only question we are required to decide. The transcript before us contains all that is necessary to present this question, and all that we would consider in deciding such question, namely: the amended affidavit and information, the appellees' motion to quash the same, the ruling of the court on such motion and the State's exception, and the final order for the appellees'

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discharge. So far as we can see, this transcript fairly presents for decision, the only question in the case, namely : the sufficiency or insufficiency of the affidavit and information. The motion to dismiss the appeal is overruled.

In the affidavit and information it was charged, in substance, that, on or about the 1st day of August, 1882, and on divers other days before the filing of such affidavit and information, at and in Montgomery county, Indiana, the appellees did then and there unlawfully maintain and cause to be maintained a slaughter-house for the purpose of slaughtering cattle, hogs and sheep; and that the appellees, on said day, and on divers other days before the filing of such affidavit, at and in said county, did slaughter in said slaughter-house, divers cattle, hogs and sheep, and did then and there deposit, and cause to be deposited, near said slaughter-house, the heads, entrails and other offal from said cattle, sheep and hogs, where the same decayed, causing noxious and dangerous exhalations and offensive smells to arise, which were very injurious to the health, comfort and property of citizens living in the vicinity of said slaughter-house; and that said slaughter-house is situated near a stream of water called Dry Branch, and also near two public highways, and that the offal as aforesaid thrown from said slaughter-house causes the water of said Dry Branch to be corrupted and poisoned, and rendered wholly unfit for stock water, and that divers citizens, from time immemorial, have used the waters of said Dry Branch, below said slaughter-house, for the purpose of watering their milch cows, cattle, hogs, etc., and that the milk of said milch cows is poisoned by reason of said cows drinking the water of said stream, in which the appellees deposited the offal from such slaughtered cattle, sheep and hogs, and that it is injurious to persons who then and there drink such milk; and that the offal from said slaughter-house, so deposited and suffered to remain near to and in said stream, causes other great damage and prejudice to divers citizens living in the vicinity of said slaughter-house as well as to the public.

The State v. Weil *et al.*

It was further charged that said slaughter-house is built upon two public highways, and that horses of ordinary gentleness driven thereon had and then did become frightened at the stench and smell arising from the offal, thrown near said slaughter-house by the appellees, to the great damage, prejudice and annoyance of persons driving such horses on said highways, near such slaughter-house. Wherefore it was charged that the appellees were guilty of maintaining a public nuisance, contrary to the form of the statutes, etc.

The information contains only a single count, and it is manifest, we think, that the court sustained the appellees' motion to quash it and the affidavit upon which it is based, for the reason, apparent upon the face thereof, that two or more distinct offences were charged therein. In the recent case of *Knopf v. State*, 84 Ind. 316, this court held, upon full consideration, that in criminal pleadings there can be no joinder of separate and distinct offences in one and the same count. Where an information or indictment charges the defendant, in a single count, with two or more substantive offences, it is bad for duplicity, and a motion to quash the same, if made at the proper time, must be sustained. It is very clear, we think, that the State intended to and did charge the appellees, in the affidavit and information in the case at bar, with the commission of the offences which are defined, and their punishment prescribed, in sections 2066 and 2068, R. S. 1881. These two sections are too long to be copied here, but, by reference thereto, it will be seen that separate and distinct offences are defined therein, and separate and different punishments are prescribed therefor. We have given a full summary of the information in this case, and it is apparent therefrom, as it seems to us, that the appellees are charged with separate and distinct offences, for which different punishments are prescribed, in one and the same count.

We are of opinion, therefore, that the information, and the affidavit upon which the same is based, in this case, were bad

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for duplicity, and that the appellees' motion to quash the same was correctly sustained.

On behalf of the State, it is claimed that the affidavit and information charge but one offence with sufficient clearness and certainty; and that as the other offences, apparently intended to be stated therein, are not sufficiently charged, they should be regarded as mere surplusage. It seems to us, however, that this view of the question can not be sustained. We think that at least two separate and distinct offences are sufficiently charged to sustain a conviction as to either offence, and this rendered the pleadings bad for duplicity.

The judgment is therefore affirmed.

80 800
197 391

No. 9575.

THE CRAWFORDSVILLE AND EASTERN TURNPIKE COMPANY
v. SMITH ET AL.

GRAVEL ROADS.—Competing Lines.—Injunction.—A gravel road company, organized under the general laws of this State, can not prevent by injunction the construction of another competing line of turnpike, which is to be free from tolls.

From the Montgomery Circuit Court.

P. S. Kennedy, W. T. Brush, E. C. Snyder, G. D. Hurley and B. Crane, for appellant.

G. W. Paul, J. E. Humphries, G. W. Stafford, J. M. Thompson and W. H. Thompson, for appellees.

FRANKLIN, C.—This is a suit for an injunction, brought by appellant against appellees, for the purpose of enjoining the construction of a certain gravel road. The complaint, as originally filed, contained but one paragraph, to which a demurrer was sustained, and exception taken and leave granted to amend complaint and file second paragraph. It then filed as an amendment a second paragraph of the complaint, to which a demurrer was also sustained, and exception taken.

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The case comes here upon the rulings of the court below upon the demurrers.

Appellees insist that the filing of an amendment after the demurrer had been sustained to the original complaint was a waiver of any error in sustaining the demurrer to the original complaint. This would have been true if the original paragraph had been amended, but the plaintiff, by filing a new and second paragraph to the complaint, shows that it did not intend to waive the question of the sufficiency of the first, but intended to stand upon the ruling on the demurrer and reserve the question.

So far as the merits of the controversy between the parties are concerned, it makes but little, if any, difference which one of the demurrers is considered in this court, for each paragraph substantially presents the same question, and that is as to the right of the defendants to construct the proposed gravel road.

The complaint alleges that the plaintiff is the owner of a gravel road consisting of two branches—one running from the city of Crawfordsville in an easterly direction to the town of Shannondale in said county, a distance of ten miles; the other from the city of Crawfordsville in a southeasterly direction, to the town of Fredericksburg, in said county; that each of said branches was fully constructed in every particular, at a large cost, open to the public for travel, and upon which it was receiving tolls; that the defendants contemplated, threatened and were proceeding to construct another gravel road from said city of Crawfordsville in an easterly direction, between and parallel with said branches of said plaintiff's road for a distance of five miles, to a point designated; that said proposed gravel road was to be free from toll to all persons travelling over it, and, if constructed, would break down and destroy the profits of plaintiff's franchise to receive and collect toll for travelling over its said branches.

A map or diagram of plaintiff's branches and defendants' proposed road is furnished in the transcript, by which it appears that plaintiff's Shannondale branch commences at the

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eastern terminus of Market street, in the city of Crawfordsville, and runs thence northeast to the section and township line on the south side of township No. 19 n. and range 4 w.; thence east on said line, in the direction of said Shannondale. The Fredericksburg branch commences at the eastern terminus of Main street, in said city of Crawfordsville, the same being the first street south of said Market street, and runs east about one-quarter of a mile; thence south, about 60° east, in the direction of Fredericksburg. A toll-house and gate is erected on each of the branches, one-half mile east of the city of Crawfordsville.

The defendant's proposed road commences at the eastern terminus of Wabash avenue, being the second street south of said Main street in the said city, and runs thence east on the half-mile sectional line to its termination, crossing plaintiff's Fredericksburg branch at or near its toll-house and gate, and running parallel with and one-half mile south of plaintiff's Shannondale branch.

Upon these facts the question is presented, Has the plaintiff the right to enjoin the construction of the proposed gravel road?

The first section of the act of 1852, with amendatory and supplemental acts (see 1 R. S. 1876, p. 654), provides as follows: "That any number of persons may form themselves into a corporation for the purpose of constructing or owning plank, macadamized, gravel, clay and dirt roads, by complying with the following requirements." Then follows, in that and the succeeding sections, the manner of organizing a corporation for that purpose.

The thirteenth section provides that when the road has been completed a certain distance, the company *may* erect toll-gates and collect toll, and limits the amount that may be collected. There is nothing in the law obligatory upon the company to charge and collect toll. There is nothing to prevent the making of a free road if they so desire. Appellant denominates appellees' proposed road as a *shun-pike* road, and,

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therefore, its construction ought to be enjoined ; and we are referred to several authorities upon the subject.

The decision referred to as having been made by the Superior Court of Cincinnati, as contained in the extract furnished us, explains what is meant by a *shun-pike* road. We copy the following clause : "The object of the suit was to restrain the defendants from throwing open a strip of land 800 feet long and 40 feet wide, for the purpose of travel, the said land being 300 feet west of the plaintiff's toll-gate, running parallel to their turnpike, the purpose being, as it was alleged, to use it as a shun-pike, and thereby avoid the payment of tolls. The court remarked that no matter what the intention of the defendants was, it clearly appeared that this road running around the toll-house and coming into the main thoroughfare again, is a shun-pike." It means where there is a way or road around the gate and again connecting with the road upon which the gate is situated, so that persons can travel over the turnpike road and around the gate, and thereby save paying toll.

The 17th section of the aforesaid gravel road act gives a gravel road company ample remedies against travelling upon a shun-pike, without resorting to the extraordinary remedy of injunction.

The defendant's proposed road in this case can not be correctly called a shun-pike. It nowhere connects with either of plaintiff's branches so as to divert travel over either of their branches from and around either of their toll-gates ; it only crosses the Fredericksburg branch at or near the toll-gate, but has no travelling connection with it, and does not touch the Shannondale branch, but is nearly all of its distance one-half mile therefrom ; it can not, therefore, be a shun-pike, but if constructed will be an independent gravel road. Hence we come back to the question as to the defendants' right to construct the road.

In this State, for nearly thirty years, gravel roads have been constructed under a general law, and not under special char-

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ters, and it will be presumed, the record not showing the contrary, that plaintiff's branches were constructed under this general law. The defendants have the same right to construct a road that the plaintiff had to construct its branches, and the plaintiff could not, by the construction of its branches, monopolize the whole southeastern part of the county so as to prevent any other gravel road from being constructed therein. It could not be said that any one of the numerous railroads running into the city of Indianapolis would have the right, under the general railroad law, to enjoin the construction of any other railroad line into the city, although it should, a part of the distance, or even all the distance, run close to and parallel with its line already constructed. Such a monopoly as is contended for would contravene the spirit of our Constitution and the general laws made in pursuance thereof.

Gravel road companies organized under this general law have no exclusive rights over the territory of the country except that included within the right of way for their roads. Other citizens have the right to organize new companies and build new roads as close to the right of way of those already built, or as far distant therefrom, as they may desire, and to cross each other's right of way whenever necessary, upon the proper terms.

In the case of *Auburn, etc., Co. v. Douglass*, 9 N. Y. 444, it was held, opinion by SELDEN, J., that legislative acts granting franchises to corporations are to be construed strictly according to their terms; and the grantees in such acts take nothing by implication, either as against the power making the grant or against other corporations or individuals.

The acts authorizing the formation of plank road companies give to such companies no interest or easement in or upon the lands adjoining their road, and no right to restrict the use which the proprietor of such lands may make of his own property. The owner of land may put it to any use which does not infringe on some fixed legal right of another; loss or damage to one person, arising from the use made by another

The Crawfordsville and Eastern Turnpike Company *v.* Smith *et al.*

of his own premises, being *damnum absque injuria*, unless the former has previously acquired some legal right to restrict the use which the latter shall make of such property. Where no such right of restriction exists, it is immaterial what may be the motives of the proprietor for dealing with his own property in a particular way.

In the case at bar, it is not contended that the plaintiff had any easement or fixed legal right whatever to the adjoining or adjacent lands to the right of way of either of its gravel road branches; hence the owners thereof had the right to use their lands as they might desire, and they could themselves construct, or grant the right to others to construct, a gravel road, or any other kind of a road, over their lands, along, by the side of, and parallel with, either of appellant's gravel road branches; and others might, by legal proceedings, condemn such lands, if the right of way was not granted by the owners, and still construct a new road, without the power of appellant to hinder or molest; and the plaintiff has no right to enquire into the motives of the doers, or whether it will in any way be profitable to them, or in what manner it may affect the profits of the plaintiff's road or branches.

We have been referred to a class of cases that depended upon a license from the sovereign, such as the establishment of ferries, where the licensee had paid his license for the privilege of transacting the business. We do not think that this class of cases is applicable to the question under consideration.

Where corporations are created under special charters, there may be some conflict of opinion as to the right to create other corporations, the business of which will come in conflict with the business of those already established; but we think, where the sovereign has granted a special charter to a corporation to conduct a particular business, without granting any exclusive privileges, over that business, the same sovereign may in like manner grant special charters to other corporations to carry on the same business, and where there is a conflict of profits between them, the first is remediless. *Charles River*

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Bridge v. Warren Bridge, 11 Peters, 420. But the questions of special charters and exclusive privileges thereunder are not before us, and we decide nothing in relation thereto. But we do hold that under the general gravel road law, which is free to all, without limitation or restriction, the construction of a gravel road by a corporation gives it no right to prevent the construction of other gravel roads by other corporations, however much they may come in conflict with its business or the profits thereof; and the plaintiff has no right to say that the defendants have not organized a legal corporation, and for that reason enjoin their proceedings. That question can only be raised by a proceeding in the name of the State.

We conclude this opinion with an extract from the opinion of Chief Justice TANEY, in the celebrated case in 11 Peters, *supra*:

"And what would be the fruits of this doctrine of implied contracts on the part of the States, and of property in a line of travel by a corporation, if it should now be sanctioned by this court? To what results would it lead us? If it is to be found in the charter to this bridge, the same process of reasoning must discover it, in the various acts which have been passed, within the last forty years, for turnpike companies. And what is to be the extent of the privileges of exclusion on the different sides of the road? The counsel who have so ably argued this case, have not attempted to define it by any certain boundaries. How far must the new improvement be distant from the old one? How near may you approach without invading its rights in the privileged line? If this court should establish the principles now contended for, what is to become of the numerous railroads established on the same line of travel with turnpike companies; and which have rendered the franchises of the turnpike corporations of no value? Let it once be understood that such charters carry with them these implied contracts, and give this unknown and undefined property in a line of travelling; and you will soon find the old turnpike corporations awaking from their sleep, and calling

The Crawfordsville and Eastern Turnpike Company v. Smith et al.

upon this court to put down the improvements which have taken their place. The millions of property which have been invested in railroads and canals, upon lines of travel which had been before occupied by turnpike corporations, will be put in jeopardy. We shall be thrown back to the improvements of the last century, and obliged to stand still, until the claims of the old turnpike corporations shall be satisfied ; and they shall consent to permit these States to avail themselves of the lights of modern science, and to partake of the benefit of those improvements which are now adding to the wealth and prosperity, and the convenience and comfort, of every other part of the civilized world. Nor is this all. This court will find itself compelled to fix, by some arbitrary rule, the width of this new kind of property in a line of travel ; for if such a right of property exists, we have no lights to guide us in making out its extent, unless, indeed, we resort to the old feudal grants, and to the exclusive rights of ferries, by prescription, between towns ; and are prepared to decide that when a turnpike road from one town to another, had been made, no railroad or canal, between these two points, could afterwards be established. This court are not prepared to sanction principles which must lead to such results."

We have made the foregoing lengthy extract for the reason that we think it applicable to the advanced stage of progress and public improvement in the State, and also illustrative of the question under consideration.

We think there was no error in sustaining the demurrer to each paragraph of the complaint, and that the judgment below ought to be affirmed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment of the court below be and the same is in all things affirmed, with costs.

Opinion filed at the May term, 1882.

Petition for a rehearing overruled at the May term, 1883.

Nichols v. The State.

No. 10,846.

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NICHOLS v. THE STATE.

CRIMINAL LAW.—*Public Highway.*—*Information for Obstructing.*—*Description.*

—An information for obstructing “A certain public highway, situated on the half section line running north and south through the center of section 11, township 33, range 9, Lake county, Indiana,” sufficiently describes the way, and shows it to be a public highway.

SAME.—*Evidence.*—*Township Trustee.*—In a trial upon an information for obstructing a public highway, evidence that the township trustee told the defendant that he had a right to fence up the way is inadmissible.

SAME.—*Intent.*—The intent with which a defendant, prosecuted criminally therefor, has obstructed a public highway, is not material.

SAME.—*User.*—*Prescription.*—A way used by the public, and recognized by the proper officers, for more than twenty years, as a public highway, is, though it be short and terminate on private property, a public highway.

From the Lake Circuit Court.

T. S. Fancher and J. W. Youche, for appellant.

F. T. Hord, Attorney General, and *J. B. Peterson*, Prosecuting Attorney, for the State.

ELLIOTT, J.—The information charges appellant with obstructing a public highway, and thus describes it: “A certain public highway, located and situated on the half section line running north and south, through the center of section 11, township 33, range 9, Lake county, Indiana.”

We deem the description sufficient. It is not necessary for the prosecutor to state the facts which constitute the way a public one; the requirements of the law are complied with by the averment that the way obstructed is a public highway. The term “public highway” has a fixed and well known signification, and no useful purpose would be subserved by requiring the specific facts which give the way its public character to be pleaded. 2 Bishop Crim. L., sec. 1266. Our cases recognize the sufficiency of such a pleading as that before us.

In describing the location of the highway, it is sufficient to give such a description as will identify the way charged to have been obstructed and distinguish it from other high-

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ways of the county. No greater particularity of description is necessary. *State v. Stewart*, 66 Ind. 555. The pleading under discussion conforms to this rule.

It was not error to refuse to permit appellant to prove that the township trustee told him that he had a right to fence up the way. Where, as here, it is shown by uncontradicted evidence that a way had been used as a public one for more than twenty years, and had been recognized as such by public officers, the township trustee can not license its obstruction, nor can any statement of his protect one who obstructs it. The trustee can not change the character of such a way, nor can his decision that it is not a way, because not regularly laid out, absolve one who obstructs it from liability.

Where one purposely places an obstruction across a public way in violation of the express provisions of a statute, the question of intent is not a material one. In cases of the class to which the present belongs the specific intent with which the act is done has no controlling influence. 1 Bishop Crim. L., sec. 1075. Any other rule would render it impossible to convict of many statutory offences, because in many of them, as for instance selling liquor without license, erecting and maintaining nuisances, it would be impossible to prove more than that an act had been done which the law prohibited. Of course, where intent is an ingredient of the offence it must be proved, whether the offence be purely statutory or otherwise.

A road used by the public for more than twenty years, and recognized by the road officers as a highway, is a public highway, although it may not be of great length and may terminate on private property. The character of the way is not to be determined by its length nor from the place where it terminates. *Sheaff v. People, ex rel.*, 87 Ill. 189; S. C., 29 Am. Rep. 49, *vide* note 51; *People, ex rel., v. Kingman*, 24 N. Y. 559; *Bartlett v. City of Bangor*, 67 Maine, 460.

Judgment affirmed.

Galbreath v. Black.

No. 10,199.

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GALBREATH v. BLACK.

GUARDIANSHIP OF INSANE PERSON.—*Dismissal of Proceeding.—Duty of Court.*

—A proceeding, under section 2545, R. S. 1881, to have an inhabitant of the county declared to be a person of unsound mind and incapable of managing his own estate, with a view to his guardianship, is not a civil action, and, therefore, the person instituting such proceeding has no right to dismiss the same without the consent of the court; and, as a rule, the court ought not to consent to the dismissal of such proceeding over the objections of the person alleged to be of unsound mind.

SAME.—*Judgment for Costs.*—Under section 2548, R. S. 1881, where, in such a proceeding, the jury find that the person, against whom the complaint is filed, is not of unsound mind, the court must render judgment for costs against the person making such complaint.

From the Kosciusko Circuit Court.

C. Clemans and A. C. Clemans, for appellant.

H. S. Biggs, for appellee.

HOWK, J.—The appellant, Margaret A. Galbreath, filed a petition in the court below, under the provisions of section 2545, R. S. 1881, wherein she represented to the court that Mary Black, an inhabitant of Kosciusko county, was a person of unsound mind and incapable of managing her own estate. Afterwards Mary Black appeared in court, in person and by counsel, and the clerk of the court, as required by the statute, filed an answer in denial of the facts set forth in such petition; which issue was tried by a jury, empanelled under the direction of the court. The record shows that after a portion of the evidence had been heard, and on the second day of the trial, the appellant, Margaret A. Galbreath, in person asked leave of the court to withdraw a juror from the panel and to dismiss the case, and withdraw her petition, and did then withdraw her petition and dismiss the case. Thereupon the record states that the said Mary Black, in person and by her counsel, objected to the dismissal of the proceeding; and the court overruled the appellant's application for leave to dismiss, to which ruling appellant excepted.

Galbreath v. Black.

Written objections were then filed by appellant to the court's proceeding further in the case upon her application, and to the submission of the cause to the jury or their taking further action in the cause, for the reason that the same had been dismissed by her, and she declined to prosecute the case any further. These objections were overruled by the court, and the appellant having declined to give further evidence or proceed further in the trial, the cause was submitted to the jury under the instructions of the court. Afterwards a verdict was returned finding that "Mary Black is a person of sound mind and capable of managing her own estate." The court overruled appellant's motion to tax the costs of the proceeding against Mary Black, and appellant excepted to this ruling. Judgment was then rendered in accordance with the verdict, and that Mary Black recover her costs of the appellant.

It is earnestly insisted by the appellant's counsel, that the trial court erred in overruling her motion for leave to dismiss the proceeding and withdraw her petition. In support of their position, counsel cite and rely upon section 333, R. S. 1881, wherein it is provided that an action may be dismissed without prejudice by the plaintiff before the jury retires. But the proceeding before us is not, in any sense, an action within the meaning of the civil code, and, therefore, we think the section cited is not applicable to the case in hand. This is an *ex parte* proceeding under a special statute, and has few of the qualities or attributes of a civil action. *Hutts v. Hutts*, 62 Ind. 214. The statute under which the proceeding was instituted does not require that any notice thereof should be given to the alleged insane person. In section 2545, R. S. 1881, it is provided that when the written statement has been filed, representing to the proper court that an inhabitant of the county is an insane person, etc., "such court shall cause such person to be produced in court." But, in section 2547, R. S. 1881, it is further provided that "If the court shall be satisfied that such person, alleged to be of unsound mind, can

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not, without injury to his health, be produced in court, such personal appearance may be dispensed with."

We are of opinion that in such a proceeding as the one at bar the party making the complaint can not dismiss such proceeding without the consent of the court before whom the same is pending, and that, as a rule, such consent ought not to be given, over the objections of the person alleged to be of unsound mind. Such person is entitled, we think, if there is a failure of evidence to sustain the complaint, to the verdict of the jury finding that he is not of unsound mind; and the complaining party ought not to be permitted to deprive him of such right, over his objections, by the dismissal of the proceeding or the withdrawal of such complaint. It seems to us, therefore, that the court committed no error in overruling appellant's motion for leave to dismiss the proceeding and withdraw her petition.

The only other question discussed by counsel relates to the judgment below in favor of Mary Black, and against the appellant, for the costs of this proceeding. This question is settled, we think, adversely to the views of appellant's counsel by the provisions of the statute. In the last sentence of section 2548, R. S. 1881, it is provided that "if the jury find that such person is not of unsound mind, then the court shall give judgment against the person making the complaint for the costs."

We have found no error in the record of this proceeding.

The judgment is affirmed, with costs.

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No. 9728.

THE STATE, EX REL. KOONS, *v.* THE FIRST NATIONAL
BANK OF JEFFERSONVILLE ET AL.

ASSIGNMENT OF ERRORS.—*Names of Parties.*—An assignment of cross errors need not give the names of the parties as required by rule of court in the assignment of errors by an appellant.

MANDATE.—*Transfer of Bank Stock.*—*Sale by Sheriff.*—*Execution.*—Mandate

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lies to compel the officers of a bank to give a sheriff access to its books to transfer stock of the bank to one to whom he has sold such stock on execution, as the statute, R. S. 1881, section 723, requires.

SAME.—*Description of Stock.*—“Ten shares of the capital stock of said bank, then the property of” a person named, in a writ of mandate against a bank and its officers to compel them to permit a transfer of stock, is a sufficient description of the stock.

SAME.—In such case, an alternative writ against the officers of a bank which, with the other necessary averments, shows that they are such officers, have charge of the transfer books, and refuse to allow access thereto by the sheriff for the purpose of transferring the stock, is good on demurrer.

SAME.—*Return.*—*Pledge of Stock.*—*Surety.*—*Indemnity.*—A return to such writ by a national bank, that before the levy one H. held, and still holds, the certificates of stock in pledge to indemnify him as surety for the owner upon an unpaid indebtedness, is bad on demurrer; so, also, that the owner of the stock was, before the levy, and still is, indebted to the bank in a sum exceeding the value of the stock, and that in such case a by-law of the bank forbids a stockholder to transfer his stock.

PLEDGE.—*Bank Stock.*—Delivery is necessary to create a pledge, and in case of bank stock there must be an assignment of the stock on the books of the corporation, a delivery of the certificates of stock being insufficient.

From the Clark Circuit Court.

M. C. Hester, for appellant.

P. H. Jewett and C. L. Jewett, for appellees.

MORRIS, C.—The appellant, upon affidavit, procured an alternative writ of mandate to be issued out of the Clark Circuit Court, requiring the appellees and Emanuel Hawley and William H. Fogg to permit the sheriff of Clark county to transfer upon the books of said bank ten shares of its capital stock to the relator.

It was stated in the affidavit that James H. McCampbell was the president of said bank, William H. Fogg its cashier, and that Emanuel Hawley was its teller. It was also stated that on the 10th day of April, 1878, Ella Runyan recovered a judgment in the Clark Circuit Court against one David S. Koons, for \$660.90; that on the 3d day of January, 1879, an execution was duly issued on said judgment to the sheriff of said county, who, on the 11th day of said month, duly levied

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the same on ten shares of the capital stock of said bank, of the value of \$100 each, of the property of the said David S. Koons; that on the 17th day of March, 1879, said sheriff duly sold the said ten shares of stock by virtue of the said execution and levy, to the relator, for \$50, and issued to him a certificate therefor; that said sheriff thereupon called at said bank and demanded access to its books for the purpose of transferring the said stock to the relator; that the officers of said bank, viz., the said McCampbell, as president, the said Fogg, as cashier, and the said Hawley, as teller, then refused the said sheriff access to said books, and ever since have refused to permit him to make said transfer.

An alternative writ of mandate was asked, which was ordered by the court.

The writ, reciting the affidavit, was issued in due form, commanding the defendants below to permit said transfer to be made, or appear before the court on the 24th of March, 1879, and show cause, etc.

The bank entered a special appearance to the writ, and moved to quash the same. The motion was overruled, and it then filed a demurrer to the writ for want of facts. The demurrer was overruled. McCampbell, Fogg and Hawley filed separate demurrers to the writ. The demurrer of McCampbell was overruled, and those of Fogg and Hawley were sustained. No further steps were taken against Fogg and Hawley. The appellee McCampbell made return to the writ by denial of its allegations. The bank made return, in the nature of an answer, in four paragraphs, the first being a denial of the facts stated in the writ.

The appellant demurred separately to the second, third and fourth paragraphs of this answer or return. The demurrers were sustained by the court. The bank then amended its return by filing two additional paragraphs. To the first additional, or fifth, paragraph, a demurrer was sustained. The appellant replied by denial to the sixth.

The cause was submitted to the court for trial, and, at the

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request of the appellees, the court found the facts and stated its conclusions of law thereon.

The court found that on the 11th day of January, 1879, David S. Koons was the owner of ten shares of the capital stock of said bank; that at that date the defendant Emanuel Hawley held the same in pledge, as collateral security and to indemnify him as the surety for said David S. Koons, upon a note held by said bank for \$4,144, signed by said Koons as principal and said Hawley as surety, and that said indebtedness to said bank is unpaid. The recovery of a judgment by said Ella Runyan against said David S. Koons, the issuing of an execution thereon, the levy upon and sale of said ten shares of stock to the relator, are found by the court substantially as alleged in the complaint, except it is found that the sale was made subject to the rights of said Hawley as such pledgee. It is also found "that immediately after said sale the sheriff demanded of said Hawley and of the said Fogg, in the banking rooms of said bank, during banking hours, the transfer books of the bank kept for the transfer of stock sold, for the purpose of transferring said stock to said relator; that said Hawley and said Fogg refused to furnish said book or permit said sheriff to have access thereto for the purpose of making said transfer; that said Fogg is, and was at the time of making said transfer, cashier of said bank, and had immediate charge of its books and business affairs; that the said Hawley is and was the bookkeeper in said bank; that James McCampbell is, and was at the date of said sale, president of said bank. On the 5th of July, 1879, said sheriff returned said execution without having made said transfer, the officers of said bank continuously refusing to permit said transfer to be made.

"Upon the facts the law is found to be as follows: The relator is the owner of said stock and entitled to have the same transferred to him upon the transfer book of said bank; that said transfer should be made subject to the rights of said

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Hawley as such pledgee, and that a peremptory writ of mandate should issue to the officers of said bank, commanding them to give said sheriff access to the said transfer book of said bank, that he may transfer said stock to the purchaser, subject to the rights of said Hawley as pledgee thereof."

The appellant moved the court to correct and amend the findings and conclusions of law. This motion was overruled. Both parties excepted to the conclusions of law stated by the court.

The appellant moved the court for judgment and an order requiring said bank and its officers to permit the sheriff to transfer to the relator the said ten shares of the stock in said bank, mentioned in the complaint, without any regard to or mention of any lien of the said Emanuel Hawley, notwithstanding the finding of the court to the contrary, for the following reasons:

- 1st. Because said Hawley is not a party to this suit.
- 2d. Neither Hawley nor any of defendants has asked for affirmative relief.
- 3d. The finding that Hawley had such lien is not within nor pertinent to the issues.

This motion was overruled by the court. The appellant then moved for a new trial. The court overruled this motion. Judgment was then rendered by the court in accordance with its finding of facts and conclusions of law.

The relator then moved to modify the judgment, so as to secure him a transfer of said stock without reference to or mention of the rights of said Hawley. The motion was overruled.

The appellant assigns as errors the rulings of the court upon the demurrers of Fogg and Hawley to the alternative writ and upon the several motions made by him.

The bank assigns as cross errors the rulings of the court upon its motion to quash the alternative writ of mandate, upon its demurrer to said writ, and upon the demurrers to

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the second, third, fourth and fifth paragraphs of its answer or return to the writ of mandate.

The appellee McCampbell also assigns as a cross error the ruling of the court upon his demurrer to the complaint.

The appellant insists that the cross errors are not well assigned, because the names of the parties are not stated in full in the assignment. He claims that the rule of this court requiring the names of all the parties to be stated in full in the assignment of errors applies to the assignment of cross errors. The rule does not expressly apply to the assignment of cross errors, and, being somewhat technical in its nature, it should be strictly construed; it should not, by construction, be so enlarged as to apply to the assignment of cross errors; besides, the object of the rule is to require the assignment to give the names of all parties, so that it might be known upon whom notice of the appeal should be served. *Nichol v. Henry, ante*, p. 54. There is, therefore, no reason why the rule should apply to cross errors. We think the objection is not well taken, and we will first consider the cross errors.

We may consider the motion to quash the writ and the demurrer to it together; for, if the motion should have prevailed, the demurrs should have been sustained.

The appellees contend that, upon the facts stated in the writ, the appellant had an adequate remedy at law, and was not, therefore, entitled to the writ; that the writ does not lie to compel a corporation to transfer upon its books shares of its capital stock when sold. This is, perhaps, as a general rule, the law. High says: "The courts refuse to lend their interference by this extraordinary writ for the purpose of compelling the transfer to a purchaser of shares of capital stock upon the books of an incorporated company, or to compel a company to issue certificates of stock." High Ex. Legal Rem., section 313. *Shipley v. Mechanics' Bank*, 10 Johns. 484; *Ex Parte Fireman's Ins. Co.*, 6 Hill, 243; *State, ex rel., v. Rombauer*, 46 Mo. 155; *Baker v. Marshal*, 15 Minn. 177; *Kimball v. Union*

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Water Co., 44 Cal. 173 (13 Am. R. 157); *King v. Bank of England*, 2 Doug. 524. But it is held that where the law makes it the duty of corporate officers to make the transfer, he occupies somewhat the position of a public officer, and that in such case he may be compelled to make the transfer by mandamus. *Bailey v. Strohecker*, 38 Ga. 259; 2 R. S. 1876, p. 296, section 739. Section 1168, R. S. 1881, provides that "Writs of mandate may be issued to any inferior tribunal, corporation, board, or person, to compel the performance of an act which the law specially enjoins." 2 R. S. 1876, p. 208, section 437. Section 723, R. S. 1881, provides that "Shares of stock in any corporation or company may be levied upon and sold in the county where the office and books showing the shares of stock and stock-holders of the corporation or company are kept; and the sheriff shall transfer the stock, subject to the rights of the corporation or company. The sheriff shall have access to the books of any corporation or company in his county, for the purpose of making the levy; and if refused access, the court shall enforce the right. The shares of stock subject to be levied upon shall be bound by the execution from the time of the levy; and when such levy is made, the sheriff shall leave the notice thereof with the officers of the company, and such levy shall constitute a lien upon the stock from the time of such levy."

The above section makes it the duty of the sheriff selling the stock to transfer it when sold to the purchaser. The transfer which the sheriff is thus required to make could only be made in this case upon the books of said bank. *Weyer v. Second Nat'l Bank*, 57 Ind. 198. But the sheriff could not make the transfer on the books of the bank, unless he could have access to the books; he could only obtain access to the books of the bank through its officers. The statute, therefore, by implication makes it the duty of such officers to give the sheriff access to the transfer books of the bank for the purpose of making such transfer, and, upon refusal, we think mandate the proper remedy to compel the discharge of this

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duty. We think this case falls within the principle decided in the case of *Bailey v. Strohecker, supra*, and the case of *Rex v. Worcester Canal Co.*, 1 Man. & R. 529. We think this objection to the complaint not well taken. *Green Mount, etc., Turnpike Co. v. Bulla*, 45 Ind. 1.

It is also objected to the complaint that it does not identify with sufficient certainty the stock levied upon and sold. We think it does. It is described as "ten shares of the capital stock of said bank, then the property of said David S. Koons." We think this description sufficient to enable the sheriff to identify the stock and properly transfer the same on the appellees' books. We think the court did not err in overruling the motion to quash the writ, nor in overruling the demurrs to it.

The appellees waive the third error assigned, but insist that the court erred in sustaining the demurrer to the third paragraph of the bank's return to the writ. Assuming, as the parties seem to have done, that this mode of pleading is proper, do the facts stated in this paragraph constitute a good return to the writ?

This return states that the defendant is a national banking association, organized under the acts of Congress more than five years prior to said alleged sale of said stock ; that David S. Koons, named in said writ, was on the 10th day of April, 1878, and before and at the time specified in said writ, and still is, indebted to said bank, as principal, in the sum of \$4,000, and that one Emanuel Hawley was surety for said Koons on said indebtedness ; that for the purpose of securing and indemnifying him, and saving him harmless from the payment of said indebtedness, the said Koons long before the 10th day of April, 1878, delivered and transferred to said Hawley the certificate of said stock for said ten shares ; that said certificate was, when said judgment against said David S. Koons was obtained, and when said execution was issued and said sale made, in the exclusive possession and control of said Hawley, who held the same in pledge to himself as collateral

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security for the payment of said debt; that said stock equitably belongs to said Hawley, and is subject to the right of said Hawley to hold and to keep, and of this defendant to prevent the transfer thereof, until said indebtedness shall be paid.

We think there was no error in sustaining the demurrer to this return. The statute requires the sheriff to transfer the stock subject to the rights of the bank. If Hawley had any equity in or to the stock, it was his duty to protect such rights. He made no claim to the stock, and, as between him and the relator, there was nothing to try; but had he appeared and set up the same facts, it would not have barred the relator's rights. He would still have been entitled to a transfer of the stock, subject to Hawley's equities.

The fourth return stated that David S. Koons held the stock subject to a by-law of the bank, which provided that no transfer of stock should be made by a stockholder while indebted to the bank. It is alleged that David S. Koons was so indebted at the time the sheriff sold the stock in question. We do not think that this by-law prevented the levy upon and sale of the stock held by David S. Koons. *Bank v. Lanier*, 11 Wal. 369. There was no error in sustaining the demurrer to this return.

Counsel for the appellees do not notice the sixth cross error assigned. It will be regarded as waived.

We think the alternative writ stated a good cause of action against both Fogg and Hawley. It is alleged that they were officers of the bank; that they had charge of its transfer books and had, as such officers, refused to allow the sheriff access to said books for the purpose of making said transfer. The demurrsers admit these facts. It was their duty, if, as officers of the bank, they had charge of its transfer books, to allow the sheriff access to them. We think the court erred in sustaining the demurrsers of Fogg and Hawley to the alternative writ of mandate; but, as the bank and its president were before the court, the error was perhaps harmless.

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The court finds that at the time of the sale of said stock said Hawley held the same in pledge for his security and indemnity against the payment of a note on which he was liable to the bank as the surety of David S. Koons, the owner of the stock sold. This finding was, we think, within the issues of the case. If, as found by the court, Hawley, at the time the levy and sale were made, held the stock in pledge, he must have appeared upon the books of the bank as the owner of said stock. He could not have so held it in pledge, unless it had been transferred to him on the books of the bank by David S. Koons, before said levy and sale. *Wilson v. Little*, 2 N. Y. 443; *Bowman v. Wood*, 15 Mass. 534; Story Bailments, sec. 290; *Brewster v. Hartley*, 37 Cal. 15.

In the latter case the court says: "A pledge is a bailment of personal property as a security for some debt or engagement. * The general property in the thing pledged remains in the pledgor, and only a special property vests in the pledgee. A delivery to the pledgee of the thing pledged is essential to the contract, and until that act is performed the special property that the pledgee is entitled to hold does not vest in him. In respect to most kinds of property, a delivery of the property to the pledgee, without any written transfer of the title, is sufficient to pass the requisite special property. Incorporeal property, being incapable of manual delivery, can not be pledged without a written transfer of the title. Debts, negotiable instruments, stocks in incorporated companies, and choses in action generally are pledged in that mode. Such transfer of the title performs the same office that the delivery of possession does in case of a pledge of corporeal property. The transfer of the title, like the delivery of possession, constitutes the evidence of the pledgee's right of property in the thing pledged. The transfer in writing of shares of stock not only does not prove that the transaction is not a pledge, but the stock, unless it is expressly made assignable by delivery of the certificates, can not be pledged in any other manner."

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It is the right of a pledgee, upon default of the pledgor, to sell the thing pledged. *Wood's Appeal*, 92 Pa. 379 (37 Am. R. 694). This he could not do unless he had the title.

If, as found by the court, Hawley held the stock, at the time of the levy and sale by the sheriff, in pledge, the sheriff, upon a sale of the stock upon an execution issued upon a judgment against David S. Koons, had no right to transfer the stock to the purchaser, for there was no stock in the name of D. S. Koons on the books to be transferred. The finding, therefore, is in legal effect a finding that there was no stock on the books of the bank for the sheriff to transfer to the appellant. It follows that the court did not err in overruling the motion of the appellant to correct the finding and the conclusions of law.

The appellant insists that the court erred in overruling his motion for a new trial. In this we think he is right. We have looked through the evidence carefully. It does not show that the stock was ever transferred to Hawley. On the contrary, it clearly shows that it was not. It follows that the evidence fails to show that, as found by the court, Hawley held said stock in pledge at the time the same was levied upon and sold by the sheriff, but it does show that he did not so hold it. The court further finds that, as matter of fact, the sale of the stock was made by the sheriff subject to the rights of Hawley. Neither the return of the sheriff nor the certificate of the sale of the stock shows that the sale was made subject to the rights of Hawley, nor does the officer making the sale, or any other witness, state that it was so made. We think the court erred in overruling the motion for a new trial.

PER CURIAM.—It is ordered, upon the foregoing opinion, that the judgment below be reversed, at the costs of the appellees.

The State, *ex rel.* Clawson *et al.*, *v.* Younts.

No. 10,432.

THE STATE, EX REL. CLAWSON ET AL., *v.* YOUNTS.

50	313
128	116
89	313
141	325

PLEADING.—Demurrer.—Form.—A demurrer assigning as cause "that said paragraphs, nor either one of them, contain facts sufficient to constitute a cause of action," is sufficient under the code.

SAME.—Statute of Limitations.—The statute of limitations is not available on demurrer to a complaint, unless the complaint affirmatively shows that the case is not within any of the exceptions to the statute.

DECEDENTS' ESTATES.—Administrator's Sale of Real Estate.—Master Commissioner.—Bond.—Consideration.—Common Law.—An administrator, on proper petition in 1876, obtained an order to sell real estate of the decedent; a master commissioner was appointed to make the sale, and he gave bond, with sureties, conditioned for the faithful discharge of his duties. He sold the land and converted a part of the proceeds to his own use.

Held, that the appointment of the commissioner was without authority of the statute and void, that the sale was void, and that the bond was void by statute, and, being without consideration, it was also void as a common law bond.

From the Fountain Circuit Court.

S. F. Wood and J. W. Copner, for appellants.

J. McCabe, L. P. Miller and C. M. McCabe, for appellee.

HAMMOND, J.—Complaint by the appellee, in two paragraphs, for the review of a judgment rendered in the court below in favor of the appellant's relators, against the appellee and others. The appellant's demurrer, filed to each paragraph of the appellee's complaint, was sustained as to the first and overruled as to the second paragraph. The only error assigned in this court was the overruling of such demurrer to the second paragraph of the appellee's complaint.

The appellee insists that the ruling of the court was right, for the reason, if for no other, that the demurrer was not sufficient in form. Omitting the title of the cause, etc., the demurrer was as follows: "The defendant in the above entitled cause demurs to the first and second paragraphs of the plaintiff's complaint, for the reason that said paragraphs, nor either one of them, contain facts sufficient to constitute a cause of action."

The State, *ex rel.* Clawson *et al.*, *v.* Younts.

The fifth cause for demurrer to a complaint, under section 339, R. S. 1881, is: "That the complaint does not state facts sufficient to constitute a cause of action." It is not necessary in demurring to a pleading to use the exact language of the statute; other words of equivalent meaning may be employed. The word *contain*, though not synonymous, is as broad in its meaning, as used in the above demurrer, as the word *state*; for, if a complaint does not *contain* facts sufficient to constitute a cause of action, it certainly does not *state* such facts. We are referred by the appellee to *Lane v. State*, 7 Ind. 426; *Campbell v. Routt*, 42 Ind. 410; and *Vaughn v. Ferrall*, 57 Ind. 182. Those cases are not in point. The demurrs therein, held to be insufficient, were so defective in form as not to present any of the statutory objections to the pleadings to which they were addressed.

The appellant's relators insist, in the first place, that their demurrer should have been sustained, because, as they claim, the appellee's action was not commenced within the time fixed by statute for the commencement of actions for the review of judgments. The reviewed judgment was rendered March 8th, 1880. The appellee's action for review was commenced December 18th, 1881. The statute in force at the time of the rendition of the judgment, and up to September 19th, 1881, required actions of review to be commenced within three years from the rendition of the judgment. By the statute in force since September 19th, 1881, it has been necessary that such actions, for the cause stated in the second paragraph of the appellee's complaint, should be brought within one year after the rendition of the judgment sought to be reviewed. Section 586, 2 R. S. 1876, p. 247; section 615, R. S. 1881. The section last cited provides that "Any person under legal disabilities may file such complaint at any time within one year after the disability is removed." The appellee's complaint is silent as to whether he had been under any legal disability. As it does not, therefore, appear from the complaint that the action was *not* commenced in time, the objection to it

The State, *ex rel.* Clawson *et al.*, *v.* Younts.

on this ground is not reached by demurrer. *Whitehall v. Crawford*, 67 Ind. 84; *Boyd v. Fitch*, 71 Ind. 306; *Thompson v. Parker*, 83 Ind. 96.

The second paragraph of the appellee's complaint avers, in substance, that the appellant's relators recovered a judgment against the appellee and others in the court below on March 8th, 1880, in the sum of \$894.44; that such judgment was rendered on a complaint for an alleged breach of the conditions of a bond executed by one Joseph Ristine as principal, and by the appellee and another as sureties. The occasion of the execution of such bond was Ristine's appointment by the court as commissioner to sell real estate.

The appellee's complaint alleges that manifest error appears in the proceedings of the court in which the former judgment was rendered, in this, to wit: "That said circuit court erred in overruling the demurrer filed to the complaint therein."

A transcript of the pleadings, proceedings and judgment of the court in the reviewed case is filed with the appellee's complaint for review. In overruling the appellant's demurrer to the second paragraph of the appellee's complaint, the court below rendered judgment reversing and setting aside the former judgment. It will thus be seen that the only question to be considered is whether or not the complaint in the first case stated facts sufficient to constitute a cause of action. That action was brought by the appellant, the State of Indiana, on the relation of the appellant's above named relators, against Ristine's administrator, the appellee and Horatio R. Claypool. The complaint, in substance, alleged the following facts: The relators were legatees of Garrett Clawson, who died testate in 1876. The administrator, with the will annexed of the decedent's estate, in July 1876, filed his petition in the Fountain Circuit Court, praying for an order for the sale of the decedent's real estate to pay certain legacies provided for in the will. Such proceedings were had as resulted in an order of the court to sell said real estate. Joseph Ristine was appointed by the court as commissioner to sell the

The State, *ex rel.* Clawson *et al.*, v. Younts.

same, and, as such commissioner, executed the bond sued upon to the State of Indiana, in the penalty of \$5,000, with the appellee and Claypool as sureties, conditioned that said Ristine would faithfully discharge his duties as such commissioner. Ristine, as such commissioner, sold the decedent's real estate as ordered by the court, and collected as the proceeds of the sale \$1,200, which he converted to his own use. There were other averments which made the complaint good, provided the bond sued upon was valid.

There was no provision in the decedents' act of 1852 that authorized the appointment of a master commissioner to sell real estate. The sale, without exception, was required to be made by the executor or administrator. 2 R. S. 1876, pp. from 519 to 533, inclusive; *Whisnand v. Small*, 65 Ind. 120. The appointment of Ristine as commissioner to make the sale was without authority of law. His appointment was void; the bond executed by him as principal, as such commissioner, and by the appellee and Claypool, as sureties, was void; the sale of real estate made by him as such commissioner was void. The relators, as Clawson's heirs or legatees, lost nothing by such sale, and the purchaser at such sale acquired no title.

In *Caffrey v. Dudgeon*, 38 Ind. 512 (10 Am. R. 126), BUSKIRK, C. J., on page 516, says: "Indeed, it is the settled law of this State, that where a bond or recognizance is taken by an officer or court, acting simply under statutory power, the instrument taken must be authorized by the statute or it will be void, and in suing upon such instrument the complaint must set out the facts showing that the bond or recognizance was taken in a case where the law authorized it; and, in many cases, it must appear that it was taken exactly, or substantially in accordance with the statutory power." To the same effect were previous decisions of this court, cited in the above opinion. The case of *Caffrey v. Dudgeon*, *supra*, has since been adhered to. *Ham v. Greve*, 41 Ind. 531.

In *State, ex rel.*, v. *McLaughlin*, 77 Ind. 335, which was a suit on a guardian's bond, it was held that the court had no

The First National Bank of Crawfordsville *v.* Carter et al.

authority to appoint a guardian of "unknown heirs," and that where such guardian sold real estate and converted the proceeds of the sale to his own use, he was not liable on his bond. It is said in that case: "The bond sued on shows upon its face that the pretended appointment of McLaughlin as guardian of the 'unknown heirs of Martha Gibbon,' was void. * * As, by the pretended sale of the land described in the complaint, no title passed to the purchasers, and McLaughlin, as such guardian, secured no rights by the sale, the bond was without consideration, and invalid as a common-law bond."

The complaint in the first case in which the appellant's relators obtained judgment, being upon a bond unauthorized by statute and without any consideration to make it good as a common-law bond, was bad on demurrer. The demurrer to it should have been sustained. As it was overruled the appellee's second paragraph of complaint, for review of the former judgment, on account of such error in overruling the demurrer to the complaint on which said former judgment was based, was good. The court committed no error in overruling the demurrer to the second paragraph of the appellee's complaint.

The judgment of the court below is affirmed, at the costs of the appellant's relators.

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No. 10,168.

THE FIRST NATIONAL BANK OF CRAWFORDSVILLE *v.*
CARTER ET AL.

89	317
126	347
89	317
144	607
89	317
150	102
89	317
154	89

SPECIAL FINDINGS.—A special finding of facts by the court, which fails to find as to a fact in issue, is equivalent to finding it against the party having the burden of that issue.

SAME.—New Trial.—If pertinent and material facts be proved, and there be no finding upon them, the remedy is by motion for a new trial and not for a *venire de novo*.

FRAUDULENT CONVEYANCE.—Intent.—Notice.—When a conveyance is as-

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sailed as fraudulent as against the creditors of the grantor, the grantee not being a volunteer, both the fraudulent intent of the grantor and notice thereof to the grantee must be shown.

SAME.—Sheriff's Sale.—Agreement.—Consideration.—Husband and Wife.—Notice.—Creditor's Bill.—One insolvent and largely indebted, in order to defraud his creditors, procured an uncle of his wife to buy at sheriff's sale his lands worth \$12,000, at that sum, upon an agreement that the uncle should, as he did, actually pay off the execution, \$1,559.92, and give the land to the debtor's wife. The debtor, as agreed, received for the excess of the bid, and the uncle assigned the sheriff's certificate to the wife, who took a sheriff's deed.

Held, that, it not appearing that the uncle or the wife had notice of fraud, creditors could not subject the land to the payment of their demands.

From the Fountain Circuit Court.

G. W. Paul, J. E. Humphries, L. Nebeker and H. H. Dochterman, for appellant.

J. McCabe and E. F. McCabe, for appellees.

BLACK, C.—The appellant sued the appellees, Anna Carter and Samuel Carter, her husband, to set aside a transfer of certain real estate to said Anna, as having been made to defraud the creditors of said Samuel, and to subject it to the payment of a judgment obtained by the appellant after said transfer against said Samuel, upon an indebtedness existing at the time of the transfer.

The court, upon request of the appellant, rendered a special finding, as follows:

“ 1st. On the 11th day of November, 1876, the defendant Samuel Carter was the owner of real estate lying within the counties of Tippecanoe and Fountain, in this State, worth \$50,500; he was the owner of personal property in Fountain county of the value of \$7,920; he was indebted in the aggregate sum of \$37,855.15; he was indebted to the plaintiff as alleged, and has not been the owner of any property other than as above stated since the date aforesaid.

“ 2d. On the 27th day of December, 1875, Henry T. Sample, John Sample and Robert Sample recovered a judgment in the Fountain Circuit Court against the defendant Samuel

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Carter, for the sum of \$1,362 and costs, collectible without relief from valuation or appraisement laws.

"3d. On the 1st day of July, 1876, an execution was issued on the Sample judgment and delivered to the sheriff of Fountain county; and on the 16th day of August, 1876, the sheriff, acting under said execution, levied upon the east half of the northeast quarter of section 16, township 21, range 6, of Carter's Fountain county lands, worth \$5,600; afterwards the levy was changed to the west half of said quarter-section, worth \$12,000. The change in the levy was made at Carter's request. On the latter tract were Carter's dwelling and his valuable buildings. Carter's purpose in procuring the change on the levy was to cause the latter tract to be transferred to his wife through the medium of this sheriff's sale.

"4th. The sheriff advertised the latter tract of land for sale under said execution, fixing the time therefor on the 11th day of November, 1876.

"5th. On the 11th day of November, 1876, the real estate levied upon and advertised for sale by the sheriff was by him sold to Daniel R. Lucas, who bid thereon the sum of \$12,000; of this amount Lucas paid to the sheriff \$1,559.92 cash, in satisfaction of the Sample writ, and took Carter's voluntary receipt on the execution for the residue; there being no other writ in the hands of the sheriff against Carter's property.

"6th. Lucas was a resident of Brown county, Illinois, a man of wealth and an uncle to Carter's wife; Carter's wife was a favorite of his. After Carter had procured the sheriff to change his levy, as stated in the third finding, he wrote to Lucas that his (Carter's) wife's homestead was advertised for sale, and that it would be sold, 'as he could not help it.' Lucas then came to Carter's home in Fountain county, and while there agreed with Carter to buy the land at sheriff's sale. On the day, Carter and Lucas came to the court-house together, and it was agreed between them that Lucas should buy the land and give it to Carter's wife, and that Carter

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would receipt to Lucas for any excess of his bid over the amount due on the Sample writ.

"7th. Upon the completion of his bid, the sheriff executed to Lucas a certificate of purchase, which Lucas assigned to Anna Carter, wife of the defendant Samuel Carter. The money paid by Lucas was his own, and it was furnished and paid by him without any agreement or expectation that it was in any way to be returned to him.

"8th. Mrs. Carter paid nothing for the transfer of the certificate, and had no knowledge of the agreement or transaction between Lucas and her husband until the certificate of purchase was assigned and delivered to her. She now holds the land under a deed made to her as the assignee of Lucas by the sheriff.

"9th. When Lucas was in Fountain county, there were no suits pending against Carter, and a comparatively small portion of his debts was represented by judgments. There was a mortgage lien on the Tippecanoe county lands, to secure an indebtedness to the Travellers Insurance Company of \$7,000. Lucas had no information that Carter owed any debts except that due to the Samples. Carter's principal creditors resided at places remote from his home.

"10th. The plaintiff recovered a judgment for \$2,691 against the defendant Samuel Carter and Alexander Sayers, on the 15th day of March, 1877, in the Fountain County Circuit Court, which judgment remains in full force and is wholly unpaid.

"11th. Sayers has been the owner of no property out of which any portion of plaintiff's debt could have been made since the date of the judgment therefor.

"12th. All the real and personal property of Carter has been exhausted in the satisfaction of judgments and other liens senior to plaintiff's judgment.

"13th. Both Carter and Sayers are married men and resident householders, and have been since December 27th, 1875.

"And the court states as its conclusion of law upon the foregoing facts, 1st. That the plaintiff is not entitled to the relief

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demanded in the complaint, and that the defendants are entitled to a judgment for costs."

Appellant excepted to the conclusion of law, and moved for a *venire de novo*. The motion was overruled, and judgment was rendered in accordance with the conclusion of the special finding.

Lucas paid off the execution against Samuel for the purpose of securing the property in question to his niece, said Anna, and upon the consideration that it should belong to her. Though the amount paid was small compared with the value of the property, it was not insignificant in itself, and Lucas was not under obligation to pay anything. He had a right to require, in good faith, as a condition of his payment, that she should have the property. He paid a valuable consideration upon a condition which he had a right to exact. The fact that Samuel received voluntarily for a large part of the bid, while it might, under some circumstances, be an important badge of fraud, might, under the circumstances stated, be entirely consistent with good faith on the part of Lucas and Anna. The finding does not state facts implying bad faith on the part of Lucas; and it does not appear that Anna had any notice of a fraudulent intent. The finding says she "had no knowledge of the agreement or transaction between Lucas and her husband until the certificate of purchase was assigned and delivered to her." This is all that is said of any notice to Anna, and if this is a statement by implication that at the time of said assignment and delivery she acquired knowledge, it was knowledge only of what had taken place between her husband and Lucas. She was no more chargeable with notice than Lucas, so far as appears from the finding. The inadequacy of the consideration and Samuel's inability to pay off this execution were consistent with good faith in Lucas in requiring as a condition to his payment of the execution debt, that Anna should have the property. Lucas did not purchase the property for himself, but purchased upon an understand-

The First National Bank of Crawfordsville *v.* Carter *et al.*

ing and agreement that he was to transfer it to Anna. But he paid a valuable consideration for her benefit. He paid the debt which Samuel was unable to pay, upon the understanding that by so doing he could acquire the right to give the property to Anna.

In one view, the transaction looks like a gift from the husband to the wife of the property, so far as its value exceeded the cash paid by Lucas; but Lucas made such payment, not merely for the purpose of paying Samuel's debt, nor for the purpose of procuring for Anna an interest in the property to the extent of the payment, but for the purpose of securing to her the entire property. In other words, Samuel released to Lucas, by said receipting, for a valuable consideration. To say that there was a gift from Samuel to Anna to the extent that the value of the property exceeded what was paid by Lucas, and to subject the property to that extent to the payment of Samuel's creditors, would be to take from Anna a part of that upon the consideration of her acquiring which Lucas paid off the execution. The transaction, as executed between the parties, was a conveyance through Lucas as a trustee to Anna, for a valuable consideration paid by Lucas.

When a conveyance is assailed as fraudulent as against the creditors of the grantor, and the grantee is not a volunteer, both the fraudulent intent of the grantor and notice thereof to the grantee must be shown. The burden of showing both a fraudulent intent on the part of Samuel and notice thereof to Lucas or Anna was upon the appellant. If, upon the facts stated, Anna must be treated as a purchaser for value without notice, we need not determine whether Samuel's insolvency was sufficiently shown, in view of the statute providing for the vesting in a married woman of her inchoate interest in the lands of her husband, in case of a judicial sale thereof, when such interest is not sold or barred. R. S. 1881, sec. 2508, *et seq.*

A special finding must contain all the facts essential to a recovery, and where, as is true in this case, the evidence is not in the record, the presumption is that the facts proved are

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stated in the finding, and any fact not stated must be deemed not proved. *Graham v. State, ex rel.*, 66 Ind. 386; *Stropes v. Board, etc.*, 72 Ind. 42; *Vannoy v. Duprez*, 72 Ind. 26; *Talburt v. Berkshire, etc., Co.*, 80 Ind. 434.

The absence from a special finding of a fact essential to the success of a party who has the burden of proving that fact, is, in effect, a finding against him thereon. *Graham v. State, ex rel., supra*; *Ex parte Walls*, 73 Ind. 95, 110; *Stumph v. Bauer*, 76 Ind. 157; *Studabaker v. Langard*, 79 Ind. 320.

The facts stated in the finding do not tend to establish notice of fraud to Lucas or to Anna; they rather indicate want of such notice. If pertinent and material facts were proved, upon which the court did not find, this was good ground for a new trial, but not ground for a *venire de novo*.

We think the judgment should be affirmed.

PER CURIAM.—It is ordered, upon the foregoing opinion, that the judgment be affirmed, at appellant's costs.

Petition for a rehearing overruled.

No. 8213.

SCHEIBLE v. SLAGLE ET UX.

89	323
128	463
159	254
89	323
131	126
89	323
164	582
89	323
166	107

PLEADING.—Demurrer to Reply, When Not Carried Back to Answer.—Where a demurrer to a reply has been overruled, the plaintiff can not on appeal raise the question whether the demurrer should have been carried back and sustained to the answer.

Vendor and Vendee.—Recoupment.—Eviction.—A grantee of property, of which an incorporeal hereditament forms a material part, is entitled, as against the grantor who conveys and warrants the property to him, to recoup against the purchase-money the value of such incorporeal hereditament from which he is evicted, the measure of damages being the value of the right from which the grantee is evicted; and such value is ascertained by finding what proportion the value of the part from which the grantee is evicted bears to the entire purchase-price.

Same.—Judgment.—Injunction.—A judgment, perpetually enjoining a grantee from using an easement which his grantor assumed to convey to him, may be treated as an eviction.

Scheible v. Slagle *et ux.*

SAME.—*Deed.—Description.—Evidence.*—The office of a description in a deed is not to identify the land conveyed, but to furnish the means of identification; and, when there is a general designation of the property intended to be conveyed, parol evidence is competent to show what property the description covers.

SAME.—*Fraudulent Representations.*—Fraudulent representations as to the character of the property, relied upon by the purchaser and resulting in damages to him, is a defence to the action for the purchase-money.

SAME.—*Evidence.—Judgment.—Appeal.—Recoupment.—Measure of Damages.—Deed.—Covenants, Breach of.—Eviction.*—Suit to foreclose a mortgage for purchase-money of a mill. The defence was that the plaintiff covenanted that he had a right to maintain the dam at a height of $7\frac{1}{2}$ feet, whereas the right was to a dam only $4\frac{1}{2}$ feet high, claiming damages. When the conveyance was made, a suit was pending against the plaintiff, wherein it was afterwards adjudged that the dam must be reduced to a height of $4\frac{1}{2}$ feet, but the cause was in the Supreme Court, pending on appeal. **Held**, that the record of this judgment was proper evidence for the defendant, and not affected by the appeal.

Held, also, that the judgment, being in the form of an injunction, bound the defendant, though not a party to it, and operated *per se* as an eviction from part of the property, which enabled the defendant to recoup for breach of covenant, his damages to be the value of the right from which he was evicted, measured by ascertaining the proportion it bears to the whole purchase-price.

Held, also, that, inasmuch as the deed did not specify the height of the dam, but granted all privileges to the real estate belonging, parol evidence was admissible to show its height at that time, and that the right to so maintain it was what was warranted by the deed.

SAME.—*Contract.—Fraudulent Representations.*—Where, in the sale of a mill the vendor, by falsehood, fraudulently induces the vendee to believe that he has a right to a greater height of dam than he really has, to the injury of the latter, he may recoup when sued for the purchase-money.

SUPREME COURT.—*Instructions.—Record.*—Unless all the instructions given are in the record, the Supreme Court can not say there was error in refusing instructions asked.

INTERROGATORIES TO JURY.—When the court sends to the jury interrogatories fully covering all material questions of fact, all others asked may be refused.

NEW TRIAL.—Surprise.—It is seldom that the plaintiff should be granted a new trial on account of surprise.

From the Shelby Circuit Court.

N. R. Keyes and S. W. Smith, for appellant.

O. J. Glessner, E. K. Adams and L. J. Hackney, for appellees.

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ELLIOTT, J.—Appellant sold to the appellee David H. Slagle a mill and appurtenances, and the latter executed several notes and a mortgage to secure part of the purchase-money, and this action is based on these instruments. The answer is in several paragraphs, to which replies were filed, and demurrers addressed to them by the appellee were overruled. The appellant assigns as error, as his brief puts it, “That the court did not carry back the demurrer filed to plaintiff’s several paragraphs of reply and sustain them to the several paragraphs of answer.”

We know of no rule of practice which entitles the appellant to a decision upon the sufficiency of the answers. He did not challenge them by demurrer, nor by motion for judgment *non obstante veredicto*, nor did he in any form challenge their sufficiency in the court below. The ruling on the replies was in his favor, and the exception taken was that of his adversary, so that we have a case where the complaining party neither attacked the pleading in the court below nor took any exception. The case is altogether unlike one in which a demurrer is sustained to a reply in a case where the answer is bad; in such a case the ruling is adverse to the complaining party, and the exception is his; while, in the present case, the only ruling he calls on the court to make is in his favor, and the only exception reserved is that reserved by his adversary.

It is well settled that an assignment of error does not present the question of the sufficiency of an answer or reply unless the question was, in some appropriate method, presented in the trial court. The rule as to the complaint is, by force of an express statute, different, but the statute does not embrace any other pleadings.

We are not unmindful of the common-law rule, that a demurrer searches the record, nor have we lost sight of the rule that a bad reply is good enough for a bad answer. It is, however, quite clear that the common-law rule can not prevail in all its rigor under the code. For a long time it was held, and

Scheible v. Slagle *et ux.*

with great reason, that a demurrer to a reply would not reach back to the answer; but that doctrine must be regarded as overthrown by the case of *Wiley v. Howard*, 15 Ind. 169, and cases built upon it. The application of the rule that a demurrer will be carried back to the answer has been confined to cases where a demurrer was sustained to the reply and the plaintiff appealed; or to cases where the demurrer was overruled and the defendant appealed. It is obvious that the case in hand is unlike either of the cases mentioned.

It is the theory of our system of civil procedure, illustrated by many cases, that a party who secures all he asks at the hands of the trial court, can not complain on appeal. Here the appellant only asked that his replies be declared good; his request was granted, thus giving him all he asked, and he is in no condition to complain.

It is the general rule that a party can not have the benefit of a point not properly made in the trial court, and to give a plaintiff who passes an answer without a demurrer, and has a ruling in his favor on a demurrer to his reply, a right to attack the answers on appeal, would be conferring on him a right to make a point not brought before the court below. This would be an unjust violation of the general doctrine.

A party who secures, as did the appellant, a ruling in his favor, can have no available exception, and this principle is against the rule for which counsel contend. Our statute requires that all rulings shall be excepted to, and we have neither the power nor inclination to abrogate this provision. We could not do it if we would, without overturning a long line of decisions. In such a case as this the plaintiff who declines to demur to an answer, and elects to reply, can not take an exception to a ruling in his favor sustaining his pleading. There is, therefore, no exception, and where there is no exception no question is presented except in cases where a different provision is expressly made by statute.

If a plaintiff succeeds, and the defendant insists that de-

Scheible *v.* Slagle *et ux.*

murrers were erroneously overruled to the reply, then it is competent for the former to meet the latter with the proposition that the answer was bad, and that a bad reply is good enough for a bad answer, and thus avert a reversal. But the present case is altogether different. The appellant got all he asked, reserved no exception, and relies for a reversal upon a point not presented to the trial court. In the case first stated, a defendant is seeking a reversal where he has no answer deserving a reply, and he may, with abundant reason, be met with the proposition that his bad answer merits nothing more than a bad reply.

We think there are three classes of cases: *First.* Where the answer and reply are both bad, and the defendant seeks a reversal on the ground that a demurrer has been erroneously overruled to the reply. *Second.* Where both answer and reply are bad, and a demurrer is sustained to the reply, and the plaintiff asks a reversal on the ground that the demurrer was improperly sustained to the reply. *Third.* Where the plaintiff, without demurring to the answer, replies, and the court overrules the defendant's demurrer to the reply, and the plaintiff asks a reversal because the answer is bad. It is obvious that the first and second classes are alike in principle, but are both essentially different from the third, and that the same rule may be applied to the first two classes; not, however, to the third without a palpable violation of principle.

At common law, it was not necessary to reserve exceptions, and for this reason, if for no other, the rule which prevailed under that system of practice can not be given full force under the code. To give it full scope would make nugatory the statutory provisions upon the subject of exceptions.

The defence to the action was stated in various forms. These defences, however, all turned upon the question whether the height at which the dam might be rightfully maintained was $7\frac{1}{2}$ feet or $4\frac{1}{2}$ feet, the appellee claiming that the appellant had both represented and covenanted that he had a right to

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maintain the dam at the height first mentioned, but in fact had a right to maintain it at $4\frac{1}{2}$ feet only. The appellee was permitted to give in evidence the record and judgment in an action brought against the appellant, and pending when the former purchased, wherein it was adjudged that the height of the dam must be restricted to $4\frac{1}{2}$ feet. This evidence was competent. The judgment was in effect the same as an ordinary judgment of eviction, and no one doubts that a judgment of eviction may be given in evidence to show the grantor's want of title.

The fact that the judgment had been appealed from did not destroy its competency. An appeal does not impair the force of a judgment, although it stays its execution. *Buchanan v. Logansport, etc., R. W. Co.*, 71 Ind. 265; *Nill v. Compart*, 16 Ind. 107; *Burton v. Reeds*, 20 Ind. 87; *Burton v. Burton*, 28 Ind. 342.

The general theory on which the trial court rested its instructions was, that a right to maintain a dam at a certain height is a part of the property assumed to be conveyed in a deed purporting to convey the mill property, and that, if the right was to maintain at a less height, there was, in cases where that fact has been judicially determined, an eviction, and that the grantees might, without surrendering possession, recoup the damages sustained because of the partial eviction. It is necessary to consider this theory before examining the instructions in detail.

In cases where the height of the dam adds materially to the value of the property, the right to so maintain it must be considered as a part of the thing purchased, and if the purchaser is deprived of it because his vendor did not possess it, he, the purchaser, may treat the case as one of partial failure of title, and, without surrendering possession, maintain a defense against an action for the recovery of the unpaid purchase-money. *Traster v. Snelson's Adm'r*, 29 Ind. 96. We are referred to the case of *Van Nest v. Kellum*, 15 Ind. 264, as declaring a different doctrine; but that case is not in point.

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There the damages suffered were merely nominal, and there had been no disturbance of possession ; here there was a disturbance amounting to a partial eviction, and there was, also, substantial damages.

The right to maintain a mill-dam at such a height as will furnish the water necessary to supply power to effectively and properly propel the mill is unquestionably property, and is embraced in the conveyance of the mill. If the grantor has no right to maintain the dam at the height covenanted, and there is a judicial decision of this question, and the grantee suffers injury because of the deprivation of the right to maintain the dam as covenanted, he is entitled to compensation for the loss sustained. The covenants of the deed extend to and cover the incorporeal as well as the corporeal hereditament, and if the title fails to the former, and there is an eviction, there is a breach of the covenants of the deed. Angell Water-courses (7th ed.), section 153a.

A grantee of property, of which an incorporeal hereditament forms a material part, is entitled, as against a grantor who undertakes to convey and warrant the property to him, to recoup against the purchase-money the value of the incorporeal hereditament from which he is evicted. The measure of damages is the value of the right from which the grantee is evicted. 2 Sutherland Dam. 288 ; *Stehley v. Irvin*, 8 Pa. St. 500. The damages are to be measured by ascertaining what proportion the value of the part from which the grantee is evicted bears to the entire purchase-price.

A judgment, perpetually enjoining the grantee from using an easement which his grantor assumed to convey to him, may be treated as an eviction. The judgment rendered against appellee's grantor in an action pending at the time of the sale operated as an eviction by virtue of a paramount title. Such a judgment is self-executing, and needs no act of a ministerial officer to make it effective.

The description in the deed gives the section, town, range and number of acres, and then proceeds : "And known as the

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Marietta Mill property, together with the mill-race and dam, and all the ways, appurtenances and privileges to said property belonging, and the fixtures, tools and machinery pertaining thereto." It can not be determined from this description alone what was the exact character of the property conveyed, and it was proper to read the deed by the light of surrounding circumstances. The office of a description is not to identify the land conveyed, but to furnish the means of identification. *Rucker v. Steelman*, 73 Ind. 396, auth. p. 407. The height of the dam was not fixed by the deed, and it was proper to look to extraneous evidence for the purpose of determining what was the character of the dam which the one party contracted for and the other assumed to convey.

The court, in its fifth instruction, told the jury that oral stipulations could not be incorporated in the deed, but that it might be shown by parol evidence at what height the dam was being maintained when the deed was made, and that the right to so maintain it was what the plaintiff warranted by his deed. This instruction meets our full approval. It was said in *Dawson v. James*, 64 Ind. 162, that "The descriptive part of a deed is to be construed with reference to the actual state of the property conveyed by it at the time of its execution, and the parties are supposed to refer to this for a definition of the terms made use of in the deed." Courts and text-writers agree on this point. *Angell Watercourses*, section 148; 2 Washb. Real Prop. 331; *Deshon v. Porter*, 38 Me. 289; *Sumner v. Williams*, 8 Mass. 162; Washb. Easements, 49. It was proper to permit proof to be made of the condition of the dam at the time the deed was executed, and to give evidence of the statements of the grantor as to its condition.

The rule prohibiting the contradiction of written instruments by oral evidence is not invaded by permitting testimony of the declarations of the grantor as to the character and condition of the property in cases where there is a mere general description of the real estate which the grantor assumes to

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convey. Where there is a general designation of the property intended to be conveyed, it is competent to show by parol what property the description covers. Whart. Ev., section 943. If, however, there is a precise and particular description of the property, parol evidence is inadmissible. It is obvious that a deed conveying a mill and appurtenances would be almost meaningless in cases where there is a mere general description, unless parol evidence was admitted for the purpose of applying the deed to the subject-matter.

It is a familiar rule that parol evidence is competent for the purpose of applying a contract to its subject-matter, and within this rule fall cases where a mill and appurtenances are conveyed by a general description. Angell Watercourses, sec. 364.

Fraudulent representations as to the character of property conveyed, relied upon by the purchaser and resulting in damage to him, will constitute a defence to the action for the purchase-money. If the appellant fraudulently represented to the appellee that he had a right to maintain the dam at a height of $7\frac{1}{2}$ feet, when in fact he had a right to maintain it at only $4\frac{1}{2}$ feet, and the appellee suffered injury from the fraud, he was entitled to recoup his damages against the notes sued on. The court directed the jury that, in order to establish the defence of fraud, "it must appear that the alleged representations were made by the plaintiff; that they were false, and that the defendant relied upon them as true, and was thereby induced to enter into the contract." On motion of appellant the court also instructed the jury that "it is not sufficient to prove that fraudulent representations were made by the plaintiff, upon which the defendant relied. The law required diligence on the part of the defendant, and if you find as to such fraudulent representations, if proven, that the defendant had the opportunity of ascertaining, by the exercise of ordinary diligence, the truth or falsity of such representations, it was his duty to do so, and the law will not relieve him from the result of his own negligence." It is very clear that the rule

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upon the subject of fraudulent representations was given to the jury quite as favorably to the appellant as the authorities warrant.

The court did not err in instructing the jury that if the appellee in good faith conformed to the judgment of the court requiring the dam to be cut down, he was entitled to maintain an action without proof of the enforcement of the judgment by a ministerial officer. The judgment against his grantor, rendered in an action instituted prior to the purchase, bound him and fixed the right to maintain the dam, and appellee had, as we have seen, a right to treat the judgment as working an eviction from part of the property. Where there is such an eviction, the purchaser is not bound to rescind the contract and reconvey, but may hold so much of the property as the deed conveys, and recover damages for the partial failure of title.

The instructions asked by the appellant are in the record, but all of the instructions given by the court are not, and in this state of the record we can not examine the ruling refusing instructions. It is a well settled rule of practice that no question can be presented upon the refusal to give instructions, unless all the instructions given by the court are brought into the record.

Where the court frames and submits interrogatories fully covering all the material matters of fact, there is no error in refusing to submit to the jury those asked by the parties.

New trials are seldom granted a plaintiff on the ground of surprise, for he may, if the evidence surprises him, procure a continuance or dismiss. In the present instance there is not shown such surprise as entitles appellant to a new trial. The verdict is right on the evidence.

Judgment affirmed.

Norton v. Browne.

No. 9588.

NORTON v. BROWNE.

AWARD.—Fraud.—Contract.—Set-Off.—In a suit for work and labor in the building of a house, the defendant pleaded, as a set-off, that the work was done under a special contract to build the house for \$375; that after it was done a dispute arose as to the character of the work, which was referred to arbitrators, who had awarded the defendant \$25, and given notice of their award. Reply, that at an adjourned meeting of the arbitrators the defendant, the plaintiff being absent, by false statements as to the facts, procured the award.

Held, that the reply was bad on demurrer.

CONTRACT.—Abandonment.—Evidence.—Instruction.—In a suit for work and labor in erecting a house, it was in question whether a special contract therefor had been abandoned. The jury was instructed that if, by direction of the defendant, the house erected was so different from that contracted for that all traces of the latter were so far lost that the one can not serve as evidence to identify the other, the fact *might be considered* as a circumstance *tending to prove* that the special contract had been mutually abandoned.

Held, that the instruction was erroneous.

From the Bartholomew Circuit Court.

W. F. Norton and N. R. Keyes, for appellant.

F. T. Hord and W. B. Hord, for appellee.

MORRIS, C.—The appellant sued the appellee for work and labor performed in the erection of a dwelling-house.

The appellee answered the complaint in ten paragraphs, embracing set-offs, counter-claims and matters in avoidance.

The seventh paragraph of the answer alleged that the house had been erected by the appellee under a special contract, by which he agreed to build the same for \$375; that after the house had been erected a dispute arose between him and the appellant as to whether the work had been done in a skilful and proper manner; that their differences as to the character of the work had, by agreement, been submitted to two arbitrators, mutually chosen by them; that said arbitrators had made their award, allowing the appellee \$25, and given the parties due notice of their award; this award the appellee offered to set off, etc.

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The third paragraph of the reply averred that the arbitrators met at the place and time agreed upon, but did not then proceed to make their award, but adjourned to meet at the house erected by the appellant for the appellee, on a subsequent day; that they met according to adjournment, the appellee being present, but that the appellant was not present; that the appellee induced the arbitrators to make said award by making false representations to them as to the work to be done by the appellant.

A demurrer was sustained to this paragraph of the reply. Issues were finally joined on the several paragraphs of the answer. The cause was submitted to a jury, who found in favor of the appellant.

The appellant moved for a new trial. The motion was overruled, and final judgment rendered on the verdict.

The errors assigned are thirty-five in number, involving the ruling of the court upon the demurrer to the third paragraph of the reply, and upon the motion for a new trial.

It does not appear from the reply that the appellant was not present at the first meeting of the arbitrators, nor that he was prevented from attending the second meeting through want of notice of the time and place of such meeting, nor because of any misconduct on the part of the arbitrators or the appellee. Under such circumstances, he can not avoid the award upon the assumption that his adversary took a false view of the matters in controversy or misrepresented the facts; he should have been present and have shown the arbitrators that the statements of his adversary were not true. The court did not err in sustaining the demurrer to the reply.

The appellant insists that about one-half of the seventy charges given to the jury by the court of its own motion misstate the law.

The point mainly contested upon the trial seems to have been as to whether the work was performed under a special contract for a fixed price, as claimed by the appellee, or whether the contract claimed to have been made between the parties

Norton v. Browne.

had been abandoned, and a dwelling-house, differing from that provided for in the contract, had been erected by the appellant for the appellee.

Upon this point the thirtieth charge given by the court was as follows :

“ If it appears from the evidence that a contract had been originally agreed upon between the parties which prescribes the manner in which the house is to be constructed, and providing for its several details as to rooms, doors, windows, stairs and finish, and if you further find from the evidence that a house was afterwards constructed by the plaintiff for the defendant ; but if you further find from the evidence that there is a difference between the house described in such contract and the house as finally constructed, and that the difference between them is so great that all traces of the original design in general and in details are so far lost that the one can not serve as evidence of the identification of the other, and then if it appears that these changes were directed by the defendant from time to time as the work progressed, you may consider all this as a circumstance tending to prove that such original contract had been mutually abandoned by the parties.”

We think there is error in this instruction ; it does not go far enough. The facts assumed in the instruction constituted not simply a circumstance to be considered by the jury as tending to prove an abandonment of the contract, but an actual abandonment of it. If, as assumed by the court, the contract could not be traced in the building actually erected, nor made to serve for its identification, it would be difficult, if not impossible, to perceive upon what principle it could be resorted to for the purpose of determining the rights of the parties growing out of the erection of the building. If the building could not be identified by the contract —if there was no trace of the contract to be found in the building—it would seem to be quite clear that the one could have no relation to the other. Where, as the instruction assumes, the building erected by the contractor, under the di-

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rection of the employer, is so different from that provided for in the contract that the one can not be identified by the other, the conclusion that the parties have abandoned the contract is irresistible.

Where parties enter into a contract for work and labor, and in doing the work there is a departure from the contract, mutually assented to by the parties, the contract may still be used to determine the value of the work so far as it can be followed, but no further. *Wolcott v. Yeager*, 11 Ind. 84; *DeBoom v. Priestly*, 1 Cal. 206.

As the case must be reversed for error in the above charge, we will not notice the other errors complained of.

PER CURIAM.—Upon the foregoing opinion, it is ordered that the judgment below be reversed, at the costs of the appellee.

ON PETITION FOR A REHEARING.

MORRIS, C.—The appellee asks a rehearing in this case on the ground that this court erred in holding that the instruction of the court below to the jury did not state the law correctly, and for the further reason that the instruction upon which the judgment was reversed was, if erroneous, harmless.

The instruction which was held to be erroneous assumed a state of facts which showed that the contract claimed to have been made by the parties had been abandoned, and that the work to which it related had been so performed by the mutual arrangement of the parties that no trace of the contract could be found in the work done, and then stated to the jury that such facts, if true, might be considered by them "as a circumstance tending to prove that said original contract had been mutually abandoned by the contracting parties."

We think this instruction was faulty, and calculated to mislead the jury. The facts assumed not only tended to prove, but conclusively established, the abandonment of the contract; yet the instruction impliedly told the jury that the facts did not prove an abandonment of the contract, but only consti-

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tuted a circumstance which they might consider as tending to prove an abandonment, and that they might, notwithstanding the assumed facts, find that the contract was still in force and binding upon the parties. It also, we think, by fair implication, told the jury that any change in the work, or departure from the contract, less extensive and complete than that assumed in the instruction, would not be sufficient to establish the abandonment of the contract. We think, as before stated, that the instruction was misleading and erroneous.

The appellee also contends that the appellant should not complain, because he might have corrected the instruction by asking the court to give further instructions to the jury. This may or may not be. It was the duty of the court to state the law correctly to the jury, and if it failed to do this by an incorrect instruction, the injured party, without asking the court to correct its error otherwise than by exceptions, has his remedy by appeal to this court.

The appellee insists that the instruction was harmless, because there was no testimony in the case tending to show an abandonment of the contract.

It was claimed by the appellee that the appellant had entered into a special contract to build for him a house of certain dimensions and finish, for \$275, and that the work sued for was done under this contract.

After stating the contract and his bid for the building of the house under it, the appellant testified as follows: "The house I bid on is not the same house I did build. The house I bid on was to have 16 windows and 14 doors; no moulding—all plain work. The house I did build had 20 windows and 28 doors, large and small; moulding on the base-boards and cornice; the windows and doors have mouldings and caps and many changes, and it was not the house I bid on by any means. I understood there was no contract."

Under this testimony, had the jury believed it, they might have found an abandonment of the contract, and had they so

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found this court would not have disturbed the finding on the ground that there was no testimony tending to sustain it. Yet, if the jury regarded the instruction given by the court, they could hardly have so found.

PER CURIAM.—The petition is overruled.

No. 10,942.

89 338
1167 422

COMPTON v. THE STATE.

BILL OF EXCEPTIONS.—*Change of Venue.*—*Affidavits.*—Affidavits in support of a motion for a change of venue must be incorporated in the record by a bill of exceptions, to be considered by the Supreme Court.

SAME.—*New Trial.*—Affidavits in support of a motion for a new trial can not be made a part of the record on appeal by a recital in the motion therefor; they must be embodied in a bill of exceptions.

From the Morgan Circuit Court.

L. Ferguson, for appellant.

F. T. Hord, Attorney General, *J. D. Alexander*, Prosecuting Attorney, and *W. B. Hord*, for the State.

ELLIOTT, J.—Affidavits in support of a motion for a change of venue must be incorporated in the record by a bill of exceptions or they can not be regarded on appeal. *Horton v. Wilson*, 25 Ind. 316. As there is no bill of exceptions, we can not examine the ruling denying a change of venue.

Affidavits in support of a motion for a new trial can not be made part of the record by a recital in the motion for a new trial. In order to get them into the record and entitle them to consideration by this court, they must be embodied in the bill of exceptions.

Judgment affirmed.

Hines et al. v. Driver.

10,644.

HINES ET AL. v. DRIVER.

JUDGMENT.—*Appeal.—New Trial.—Statutes Construed.—Cases Overruled.*—An order granting a new trial on complaint for causes after the term, as provided by section 563, R. S. 1881, is a final judgment within the meaning of section 632, and an appeal therefrom lies to the Supreme Court. *House v. Wright*, 22 Ind. 383, and *White v. Harvey*, 23 Ind. 55, overruled. **STARE DECISIA.**—*Practice.*—The rule of *stare decisis* should restrain a court of last resort from correcting mistakes by overruling its former decisions, only where such decisions have become recognized rules of property.

59	335
150	275
89	339
142	592
89	339
171	370

From the Hamilton Circuit Court.

A. F. Shirts, G. Shirts and W. R. Fertig, for appellants.
T. A. Hendricks, A. W. Hendricks, C. Baker, O. B. Hord,
A. Baker and E. Daniels, for appellee.

NIBLACK, J.—At the November term, 1881, of the court below, in an action on a promissory note, in which James F. Driver, the appellee, was plaintiff, and William Hines, Jr., and William Hines, Sr., the appellants, were defendants. There was a verdict and judgment against the plaintiff, in favor of the defendant William Hines, Jr., upon a counter-claim filed by him, for the sum of \$160.

On the 24th day of August, 1882, the appellee filed in the Hamilton Circuit Court a complaint, setting out the proceedings which resulted in the verdict and judgment against him as above, and demanding a new trial of the cause, upon the ground that he had discovered new and material evidence since the close of the term at which the judgment was rendered.

The appellants answered in general denial, and the issue thus formed was submitted to the court for trial at its November term, 1882. After hearing the evidence, the court made a finding for the plaintiff, and caused a judgment to be entered setting aside the judgment in the original action and granting a new trial in the cause; also ordering the clerk to reinstate the original action upon its docket, so as to make it stand for another trial at its ensuing term.

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The appellants have assigned error upon these proceedings, and the appellee has moved to dismiss the appeal for the alleged reason that the judgment herein appealed from is, in legal effect, only an interlocutory order, and not of the class of interlocutory orders from which an appeal may be taken to this court under section 646, R. S. 1881.

In response to that motion, the appellants maintain that the judgment sought to be reversed is a final judgment within the meaning of section 632, R. S. 1881, *supra*, and, consequently, a judgment from which an appeal may be prosecuted, as in case of any other final judgment.

Freeman on Judgments says: "When, in an action to set aside a judgment, the court grants the prayer of the complaint and awards a new trial, the order setting aside the judgment is a final judgment, and as such may be appealed from. The whole scope and object of the suit being to vacate the former judgment, and to procure a new trial, and the issues all being made up for that purpose, their determination necessarily puts an end to the suit." Section 18.

In the case of *McCall v. Hitchcock*, 7 Bush, 615, the Court of Appeals, in the State of Kentucky, held that a judgment vacating and setting aside a former judgment, under sections 579 and 581 of the civil code of that State, is final, and subject to appeal and revision in that court.

That case was, in all essential respects, a parallel one to this, and in its opinion upon a motion to dismiss the appeal upon the same ground as in this case, the court said:

"It is conceded by the appellee's counsel that no appeal will lie, under section 15 of the civil code, from an order granting or refusing a new trial, upon a motion in the same action, made in the usual mode under sections 369, 371, and 372 of the code; but it is contended that the judgment appealed from being the termination of a new and distinct action, litigating the right of the appellee to enforce his judgment in the previous action, which right was divested by the last judgment, the principles on which judgments or orders

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made upon ordinary motions for a new trial have been held not to be final have no proper application in this case.

"We regard this distinction as correctly taken. The judgment is not a mere interlocutory order, subject to be set aside by the same court at a subsequent term, nor simply a ministerial act; nor could it be revised, as an ordinary decision of a motion for a new trial may be, on an appeal from the judgment in the original action; but it is the final adjudication of important rights, litigated in a separate and independent suit, and is therefore properly brought before this court by this appeal for revision."

The case of *Belt v. Davis*, 1 Cal. 134, holds substantially the same doctrine, and is cited by Freeman, *supra*, as a leading case on the subject to which it relates.

As we construe them, the following cases decided by this court inferentially sustain the views expressed as above: *McKee v. McDonald*, 17 Ind. 518; *Glidewell v. Daggy*, 21 Ind. 95; *Huntington v. Drake*, 24 Ind. 347; *Houston v. Bruner*, 39 Ind. 376; *Sanders v. Loy*, 45 Ind. 229; *Hiatt v. Ballinger*, 59 Ind. 303; *Hill v. Roach*, 72 Ind. 57; *Kitch v. Oatis*, 79 Ind. 96.

The cases of *House v. Wright*, 22 Ind. 383, and *White v. Harvey*, 23 Ind. 55, support the theory upon which the motion to dismiss this appeal is based; but, in our judgment, those were not well considered cases, and ought not to be followed. They are against the evident weight of authority, and, as has been seen, inconsistent in principle with a long line of other cases in this court.

The motion to dismiss this appeal is overruled.

ON PETITION FOR A REHEARING.

NIBLACK, C. J.—The appellee's petition for a rehearing is accompanied by an elaborate review of the authorities cited as supporting the conclusion reached by us in overruling the motion to dismiss this appeal, and by a carefully prepared argument in opposition to the conclusion thus reached.

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It is urged that the opinion announced as above will, if adhered to, not only expressly overrule the cases of *House v. Wright* and *White v. Harvey*, referred to by it, but will also impliedly overrule other early cases decided by this court, and be against the current of authority in other States; that public policy requires that courts shall avoid instability in their decisions as far as possible, citing *Harrow v. Myers*, 29 Ind. 469, and that neither public policy nor the ends of justice will be promoted by adhering to the conclusion reached at the former hearing. It is true that indecision, instability and inconsistencies in judgment ought to be carefully guarded against by all courts, and especially courts of last resort, and that by a want of care in these respects the standing and influence of a court may be greatly weakened in public estimation. But, unfortunately, there is no court within our knowledge, which has had an existence for any considerable length of time, that has not felt constrained, under the pressure of a more careful or a more extended examination, to overrule cases previously decided by it.

In the administration of justice, as in all human affairs, there are currents and counter-currents, resulting from ceaseless enquiry and discussion, which carry us sometimes in one direction and then again in another, and which often urge us beyond the limit which precedent has prescribed for us. This not unfrequently leads either to the modification or the abrogation of old rules of practice or of decision, and to the substitution of others more in accordance with the teachings of experience. Because of the uncertainty which these new departures are likely to impress upon the public mind, they are usually the subject of regret, but they are none the less seemingly inevitable. When a court comes to the deliberate conclusion that it has made a mistake upon some former occasion, it is generally better, looking to future permanency and repose, that it shall frankly acknowledge its mistake and declare the true doctrine as it should have been at the time announced. When, however, a decision has become an established rule

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of property it is never overthrown except from the most urgent considerations of public policy. To that extent only are the courts ordinarily restrained from attempting to repair mistakes which they may have made.

New departures in matters of practice, as well as in the application of legal principles, are more likely to occur under a code largely experimental in its inception, and in a court like ours, where the *personnel* of the tribunal necessarily undergoes frequent, and sometimes radical, changes. But the earlier cases relied upon by the appellee are not for the first time overruled in this case. They have been in effect overruled by several more recent cases, cited in the original opinion, and can not be now followed without overruling these more recent, and, as we think, more carefully considered, cases.

Much of the apparent conflict between the cases referred to in argument has arisen from a failure to observe the essential difference between an application for a new trial made during the term, and an independent proceeding to obtain a new trial instituted after the close of the term. In the first case, the order which disposes of the application is only an interlocutory order, subject to the control of the court until final judgment, and only capable of being reviewed in connection with other proceedings in the cause in which it was made. In the latter case, the proceeding being an independent one and having but a single object in view, the order which makes a final disposition of the cause is necessarily a final order, and hence a final judgment, within the meaning of section 632 of the civil code.

The appellee concedes that in the latter case the applicant may appeal to this court when a new trial is refused, but insists that the respondent can not appeal when a new trial is granted. We fail to observe any sufficient reason for such a distinction. To enable us to allow an appeal in the one contingency, and to refuse it in the other, would require us to consider the proceeding an independent one for some purposes and an interlocutory one merely for other purposes, which

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would be in opposition to many of the decided cases cited by us in the opinion, which have held it to be in all respects an independent proceeding.

We agree that appellate courts are reluctant to reverse a case upon the ground that a new trial has been improperly granted, upon the theory that the granting a new trial rests largely in the discretion of the *nisi prius* court, and upon the ground that the erroneous granting of a new trial is likely to be ultimately less injurious than the erroneous refusal of a new trial.

But the discretion vested in the *nisi prius* court is a judicial discretion, and will be reviewed when a proper case is presented. The right of appeal from a final judgment granting a new trial is in no manner abridged because of the large discretion reposed in that respect in the *nisi prius* court.

Before the right to grant a new trial in a cause became a conceded right, it was not an unusual thing for parties feeling themselves aggrieved to institute a suit in chancery to obtain a new trial in an action at law. It will, we assume, not be pretended that the decree which was ultimately entered in such a suit, upon the merits of the controversy, was not in all respects a final decree in that cause. The proceeding provided for after the close of the term by section 563, R. S. 1881, under which the complaint in this case was filed, is quite analogous to, and is practically a substitute for, a suit in chancery for a new trial, and the final order in such a proceeding is the equivalent of the final decree in such a suit in chancery.

When, therefore, under this statutory proceeding, a party has been deprived of the benefit of a judgment which he has obtained, he may appeal to this court and invoke its judgment upon what has been already done, before proceeding further in the original action.

The petition for a rehearing is overruled.

Original opinion filed at November term, 1882.

Opinion on petition filed at May term, 1883.

Gregory v. Gregory, Administrator.

No. 10,364.

GREGORY v. GREGORY, ADMINISTRATOR.

SET-OFF.—Demurrer.—Where a demurrer is filed to two or more paragraphs of answer, by way of set-off, jointly, and not to each separately, the demurrer must be overruled if either paragraph state facts sufficient to constitute a good set-off.

SAME.—An answer by way of set-off, which does not show that the defendant held the claim which he offers to set off, at the time the suit was commenced, is bad on demurrer for the want of sufficient facts.

SAME.—Principal and Surety.—An answer by way of set-off, by one of two or more defendants, is bad on demurrer for the want of facts, if it fail to show by proper averments, that the defendant pleading the set-off is principal, and his co-defendants are sureties, in the plaintiff's cause of action.

From the Blackford Circuit Court.

W. H. Carroll and E. Pierce, for appellant.

J. Cantwell and S. W. Cantwell, for appellee.

HOWK, J.—This was a suit by the appellee, as the administrator *de bonis non* of the estate of Martha R. Gregory, deceased, to foreclose a certain mortgage on real estate in Blackford county, and to collect the debt evidenced by note secured by such mortgage. The note and mortgage were executed by the appellant to the former administrator of the decedent, and before the payment of the note that administrator died, and the appellee was appointed administrator *de bonis non*. Appellant answered in two special or affirmative paragraphs, to which the appellee's demurrer, for the alleged want of facts, was sustained by the court. The appellant excepted to the ruling, and, declining to amend or plead further, judgment was rendered for appellee as prayed for in his complaint.

Errors are assigned here which call in question the ruling of the court on the demurrer to the first and second paragraphs of appellant's answer.

In the first paragraph the appellant alleged, in substance, admitting the execution of the note, that it was given for the unpaid balance of the purchase-money of the real estate de-

Gregory v. Gregory, Administrator.

scribed in the mortgage; that the real estate was sold to appellant by the former administrator of the decedent's estate, clear of all encumbrances; that one Charity Gregory was the owner of a mortgage on such real estate to secure a promissory note, executed by the decedent, for \$330, which the former administrator, before such sale, agreed with appellant he would pay off out of the proceeds of such sale; that since the execution of the note in suit, to remove the encumbrance so held by Charity Gregory upon the real estate aforesaid, the appellant paid off the note so held by her in the sum of \$186, which sum he asked the court to set off against an equal amount of the sum found due on the note in suit.

In the second paragraph of his answer the appellant averred that the estate of Martha R. Gregory, deceased, was indebted to him in the sum of \$210.87, on claim filed against the estate of the decedent, and allowed by the appellee, as administrator; that \$—, the amount of such claim, were unpaid and due the appellant; that the estate of the decedent was solvent, exclusive of the note in suit, and there would be a distribution of the surplus of the estate to the heirs of the decedent. Wherefore the appellant asked that his claim be set off against the amount found due on the note in suit, and for other proper relief.

Appellee's demurrer was to the first and second paragraphs of the answer, and not to each of them separately. If, therefore, either of the paragraphs stated facts sufficient to constitute a good set-off, the appellee's demurrer ought to have been overruled. *Romine v. Romine*, 59 Ind. 346; *Bayless v. Glenn*, 72 Ind. 5.

We are of opinion, however, that the court did not err in sustaining the demurrer to both paragraphs of answer. In section 348, R. S. 1881, in force at the time, it is provided that a set-off, among other things, must "be held by the defendant at the time the suit was commenced." It was not alleged in either paragraph of appellant's answer, that he held the claim against the estate of the appellee's intestate stated

The Franklin Life Insurance Company v. Dehority.

therein, which he asked to set off against the note in suit, before or at the time the suit was commenced. For the want of such an allegation, it is clear that the demurrer was correctly sustained to both paragraphs of the answer. Waterman Set-Off, 87, section 73; *Balser v. Wood*, 69 Ind. 122.

The note in suit was executed by the appellant and another person, both of whom were sued and personally served with process in this action. It was not alleged in either paragraph of the answer, that the appellant was principal and the other person was surety in the note sued upon. In an action upon a promissory note against two or more defendants, a claim in favor of one of the defendants can not be pleaded by him as a set-off, unless he allege that he is principal in the note, and that his co-defendants are sureties therein. Section 349, R. S. 1881; *Knour v. Dick*, 14 Ind. 20; *Dodge v. Dunham*, 41 Ind 186; *Harris v. Rivers*, 53 Ind. 216; *Welborn v. Coon*, 57 Ind. 270.

We have found no error in the record of this cause.

The judgment is affirmed, with costs.

Opinion filed at the November term, 1882.

Petition for a rehearing overruled at the May term, 1883.

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No. 10,441.

THE FRANKLIN LIFE INSURANCE COMPANY v. DEHORITY.

PLEADING.—Answer.—An answer filed to the entire complaint, but only answering a part thereof, is bad on demurrer.

From the Madison Circuit Court.

H. J. Milligan, for appellant.

J. W. Sansberry, M. A. Chipman and J. W. Sansberry, Jr., for appellee.

FRANKLIN, C.—Appellee, Dehority, commenced this suit against appellant and various other judgment creditors of one

The Franklin Life Insurance Company v. Dehority.

Samuel Richwine, to have certain records restored that had been destroyed by fire, and to quiet his title to 240 acres of land. Appellant filed an answer, and all the other defendants were defaulted. The plaintiff demurred to appellant's answer, which demurrer was sustained. Appellant declined to answer further, and judgment was rendered for the plaintiff.

The errors assigned are, sustaining the demurrer to the answer, and "that the complaint fails to state a cause of action." We think the complaint will withstand objections raised for the first time on appeal. The ruling upon the demurrer is the only other question presented.

The answer professes to answer the whole complaint, and is filed as such, but only claims a lien for \$110 upon the inchoate interest of the wife in 40 acres of the land claimed by the plaintiff. The land was sold four or five times by the sheriff, and redeemed by successive judgment creditors. It was all finally sold by the sheriff to the plaintiff, on the 14th day of July, 1880, for the sum of \$1,804.16, enough to pay off, and which did pay, all the judgments and redemption liens, including appellant's judgment, except the lien of a decree of foreclosure of a mortgage executed by Richwine and wife on the 14th day of February, 1878, upon 40 acres of said land to one Hunt. Hunt had purchased this on his decree of foreclosure for \$91.90, leaving a balance unpaid of his decree of near \$500. On the 12th day of July, 1880, two days before the sheriff's said sale of all the lands to appellee, appellant, by virtue of having a junior judgment against Richwine, redeemed the 40 acres from the said Hunt sale, it then having an unlevied execution upon its judgment in the hands of the sheriff, which execution was paid out of the proceeds of said sale to appellee.

A part of the judgments upon which the lands were sold to appellee were older than the mortgage; and on the 14th day of May, 1879, after the execution of the mortgage, Richwine and wife conveyed all of said lands to appellee. This answer of the appellant, claiming only a lien upon the wife's interest

The State, *ex rel.* Burford, *v.* Jones *et al.*

in the 40 acres mortgaged, for the redemption money from the sale on the foreclosure decree, does not answer the whole complaint, and is insufficient for that reason. *Hancock v. Fleming*, 85 Ind. 571.

There is no available error in the record. The judgment ought to be affirmed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment of the court below be and it is in all things affirmed.

No. 10,124.

THE STATE, EX REL. BURFORD, *v.* JONES ET AL.

GRAVEL ROADS.—Tolls.—There is nothing in the statute concerning the organization of gravel road companies which prohibits them from inserting in their articles of association a clause that their roads shall be free. R. S. 1881, section 3624.

From the Montgomery Circuit Court.

P. S. Kennedy, W. T. Brush, G. D. Hurley, B. Crane and E. C. Snyder, for appellant.

G. W. Paul, J. E. Humphries, G. W. Stafford and J. M. Thompson, for appellees.

ELLIOTT, J.—The complaint assails the corporate existence of a gravel road corporation called the Crawfordsville, Walnut Fork and Shiloh Gravel Road Company, upon the ground that the articles of association contain a provision declaring that the road constructed by the corporation shall forever remain free.

The statute under which the appellees assumed to erect a corporation does not require that the articles of association shall state anything upon the subject of tolls, and the instrument would have been complete without the clause declaring the road a free one. Where articles of association contain all

The State, *ex rel.* Burford, *v.* Jones *et al.*

the material provisions required by law, the force of the instrument will not be destroyed by the insertion of a provision not required by the law under which the corporation was organized, unless the provision is of such a character as to give the entire instrument an effect which will contravene the statute.

The statute provides that "Any number of persons may form themselves into a corporation for the purpose of constructing or owning plank, macadamized, gravel, clay, and dirt roads, by complying with the following requirements: They shall unite in articles of association, setting forth the name which they assume, the line of the route, and the place to and from which it is proposed to construct the road, the amount of capital stock, and the number of shares into which it is divided. The names and places of residence of the subscribers, and the amount of stock taken by each, shall be subscribed to said articles of association. Whenever the stock subscribed amounts to the sum of five hundred dollars per mile of the proposed road, copies of the articles of association shall be filed in the office of the recorder of each county through which the road is to pass, and it shall, from that time, be a corporation known by the name assumed in its articles of association." R. S. 1881, sec. 3624. This section of the statute authorizes the incorporation of companies for the construction of a free or toll road, as the corporators may elect, for there are no limiting or restricting words, and we find no provision restricting the operation of the statute to toll roads.

One of the franchises granted is the right to collect tolls, and that is conferred in these words: "Whenever three consecutive miles of such road shall have been completed (or, if the whole of said road shall be less than three miles in length, then, in such case, when the whole of such road shall be completed), the directors of such company may erect toll-gates at such points and at such distances from each other as they may deem proper, and exact toll from persons travelling on the road." R. S. 1881, sec. 3640. This provision can not be con-

The State, *ex rel.* Burford, *v.* Jones *et al.*

strued to mean that all corporations created under the statute shall exact tolls. The words are permissive, not mandatory, and we know of no rule of construction which would justify us in holding that the broad and comprehensive provisions of section 3624 are limited and restricted by them. Grants of corporate rights are construed strictly as against corporations, but liberally in favor of the public, and this familiar rule would lead us to favor the creation of corporations which give the travelling public free roads.

It can hardly be doubted that a corporation once in being might renounce the right to take toll, and if this be so we can see no reason why this purpose may not be avowed at the time of its creation. It may be unusual for corporations to build and maintain roads for the free use of the public, but their right to do it can not be questioned with any show of reason. One who should seek to forfeit a corporate charter by proving that the corporation would not take toll when it lawfully might, would not, we apprehend, find much favor from the courts or anybody else, and we can not see any difference between such a case and the one at our bar.

It is a mistake to suppose that the only franchise the statute confers is that of the right to take toll; there are others, notably the right to seize and appropriate lands, and the right to do business as a corporation with immunity from liability on the part of the corporators.

It is true that many of the provisions of the statute can have force only as against corporations charging toll, but this proves no more than that when toll is exacted these provisions apply; it is far from proving that all gravel road corporations are bound to charge toll.

Judgment affirmed.

Petition for a rehearing overruled.

Longworth et al., Executors, v. Higham et al.

No. 10,169.

LONGWORTH ET AL., EXECUTORS, v. HIGHAM ET AL.

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SUPREME COURT.—*Transcript.*—Matter improperly embraced in a transcript will be disregarded by the Supreme Court, but will not be stricken out.

BILL OF EXCEPTIONS.—*Duty of Judge.*—The duty of the judge is to make a bill of exceptions speak the truth, and he may, therefore, amend it after it is signed but before it is filed.

SAME.—*Evidence.*—A bill of exceptions, setting out evidence and then declaring that “this was all the testimony and evidence in the case,” shows that it contains all the evidence which was given.

SAME.—A bill of exceptions, which comes to the Supreme Court in proper form in a transcript properly certified, can not be attacked by affidavits.

SAME.—*Written Evidence.*—Written evidence need not, owing to statute, R. S. 1881, section 626, be copied in a bill of exceptions.

PAYMENT.—*Evidence.*—The defence of payment is not made out by evidence which shows that less than the whole debt was paid.

From the Switzerland Circuit Court.

C. A. Korbly and C. E. Walker, for appellants.

S. Carter, C. S. Tandy, J. B. McCrellis, G. S. Pleasants, J. D. Works, J. A. Works, W. R. Johnston and F. M. Griffith, for appellees.

HAMMOND, J.—The appellants brought this action against the appellees, alleging in their complaint that on March 1st, 1864, the appellees Wm. G. Krutz, John Higham and Nancy Higham, wife of John Higham, executed to the appellants a mortgage conveying certain described real estate, as security for the payment of \$30,000, evidenced by six promissory notes of that date, each for the sum of \$5,000, payable on or before March 1st, 1874, with interest payable annually. Three of the notes were paid in full, and payments were made on the others, leaving due and unpaid, as the complaint alleges, the sum of \$7,800. The mortgage was duly recorded. The other appellees were made parties defendants on account of claims of interest in the land by conveyances subsequent to the execution of the mortgage. The appellees answered the complaint

Longworth et al., Executors, v. Higham et al.

by the general denial, and by pleas of payment. The appellants replied in denial of the pleas of payment. The case was tried by the court, and a finding made for the appellees. The appellants' motion for a new trial was overruled, an exception reserved, and judgment rendered on the finding for the appellees. The appellants filed a bill of exceptions, signed by the judge who presided at the trial, within the time allowed therefor. The appellants' assignment of errors in this court questions the correctness of the overruling by the trial court of their motion for a new trial. Before discussing this, however, it is proper to dispose of some questions pertaining to the record presented by the appellees' objections thereto. They have moved to strike from the record certain matters certified by the clerk and claimed to be unnecessary for the determination of the appeal. Section 650, R. S. 1881, indicates what are to be considered as parts of the record on appeal to this court, and provides that "If the clerk shall certify matter not material to the determination of the appeal, the Supreme Court may direct the person blamable therefor to pay the costs thereof." Superfluous matter certified by the clerk seems to be regarded as harmless except as to costs. It can do neither party any good or harm in deciding the merits of the controversy, for, not being regarded as part of the record, it receives no attention. We, therefore, do the appellees no injustice in overruling this motion. The appellees also move that the bill of exceptions purporting to contain the evidence be stricken out. While this motion may not be entertained, for the reasons above given, we may, however, determine whether the bill of exceptions is properly in the record, and, if so, whether from defects apparent in the record its consideration in deciding the case should be excluded.

The bill of exceptions as first signed by the judge, as to the evidence, concludes thus: "And this was all the testimony in the case." Afterwards, within the time allowed for, but before, filing the bill of exceptions, the judge amended the

Longworth *et al.*, Executors, v. Higham *et al.*

above by writing the words "and evidence" after the word testimony, making it read: "And this was all the testimony and evidence in the case."

The appellees insist that this amendment was unauthorized, and that it makes the bill of exceptions invalid. We do not think so. It is the duty of the trial judge to see that a bill of exceptions speaks the exact truth; and to this end he may make proper amendments at any time before the bill is filed, within the time allowed for filing the same. The appellees further insist that the judge's certificate as amended does not, as to form and substance, comply with the rulings of this court. They urge that the certificate, "And this was all the testimony and evidence in the case," is not equivalent to "And this was all the evidence *given* in the case." This objection does not impress us favorably. The evidence could not be in the case unless it was *given* therein, and the omission of the word "given" does not weaken the effect of the certificate.

It is further objected to the bill of exceptions, and attempted to be shown by affidavits, that the clerk of the court below, in making the transcript for this court, copied at each "(here insert)" written evidence which was not in the bill when it was signed by the judge. The bill of exceptions comes to us properly certified, with copies of the writings which were introduced in evidence, and, if it were material, we would have to presume that these writings were copied in the bill when it was signed by the judge. This court can not correct errors in the record of the trial court. It is true that we can, as was done in the present case, by *certiorari*, have the clerk certify to us any part of a record which may have been omitted in his first transcript. The record, when thus certified to this court, imports absolute verity, and can not be impeached by extrinsic evidence.

But if the appellees' objection, now under consideration, could be urged in this court, we would be compelled to pronounce against it. It is provided in section 626, R. S. 1881, that "It shall not be necessary to copy a written instrument

Longworth et al., Executors, v. Higham et al.

or any documentary evidence into a bill of exceptions, but it shall be sufficient to refer to such evidence, if its appropriate place be designated by the words 'here insert.' " We think the terms "written instrument" and "documentary evidence" are sufficiently comprehensive to include the written evidence appearing in the bill of exceptions in this case. We think that the bill of exceptions, containing all the evidence that was given in the case, is properly in the record.

We come now to consider the alleged error of the court below in overruling the appellants' motion for a new trial. It is claimed that the finding of the court was not sustained by the evidence. The appellants put in evidence the notes and mortgage sued upon. As already stated, the mortgage was given to secure the payment of six notes, dated March 1st, 1864, each for \$5,000, making in all \$30,000, payable on or before March 1st, 1874, with interest at six per cent., payable annually. Payments of interest were endorsed on the notes to March 1st, 1865.

The other payments proved by the evidence were as follows:

October 22d, 1866, by John Higham	\$10,000.00
June 22d, 1871, by John Higham	2,706.07
June 22d, 1871, by John Higham	1,543.93
June 22d, 1871, by Krutz, through Harris and Scranton	3,625.47
September 10th, 1872, by John Higham	2,000.00
February 17th, 1874, by John Higham	4,026.45
February 28th, 1874, by Krutz, through Harris and Scranton, paid by Jacob R. Harris . . .	14,294.42
	<hr/>
	\$38,196.34

There was no evidence tending to prove any payments except the above.

The following statement will show that there was due the appellants on the day of the trial, Oct. 24th, 1881, a balance of \$6,707 :

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Longworth <i>et al.</i> , Executors, <i>v.</i> Higham <i>et al.</i>	
Whole debt, March 1st, 1864	\$30,000
Interest paid to March 1st, 1865; whole debt March 1st, 1865	\$30,000.00
Interest from March 1st, 1865, to Oct. 22d, 1866 .	2,950.00
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	32,950.00
October 22d, 1866, paid by Higham	10,000.00
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	22,950.00
Interest from October 22d, 1866, to June 22d, 1871 (4 years 8 months)	6,426.00
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	29,376.00
June 22d, 1871, paid by Higham . \$4,250.00 } June 22d, '71, paid by Harris (Krutz), 3,625.47 }	7,875.47
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	21,500.53
Interest from June 22d, 1871, to Sept. 10th, 1872 (1 year 2 months 20 days)	1,576.69
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	23,077.22
September 10th, 1872, paid by Higham	2,000.00
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	21,077.22
Interest from Sept. 10th, 1872, to Feb. 17th, 1874 (1 year 5 months 8 days)	1,819.82
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	22,897.04
February 17th, 1874, paid by Higham	4,026.45
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	18,870.59
Interest from Feb. 17th, 1874, to Feb. 28th, 1874 (10 days)	31.45
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	18,902.04
February 28th, 1874, paid by Harris (Krutz) . .	14,294.42
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	4,606.62
Interest from Feb. 28th, 1874, to October 24th, 1881 (7 years 7 months 22 days)	2,100.38
	<hr/>
Balance due at time of trial	\$ 6,707.00

Longworth *et al.*, Executors, *v.* Higham *et al.*

The above payments, made by the appellee Harris, are noted as having been made for Krutz, because Harris and Scranton, in the purchase of a part of the mortgaged lands, had assumed the payment of that part of the debt which, as between Higham and Krutz, should have been paid by the latter. Harris testifies that when the last payment, February 28th, 1874, was made, he called on the appellant Anderson, one of the executors, to ascertain the amount then due from Krutz. After the calculation of interest, Anderson gave him what was supposed to be the amount due from Krutz, and this amount was paid. He says that Anderson refused to give him a release of the mortgage as to the lands he and Scranton had purchased. When he asked Anderson for such release, he says Anderson replied: "It" (the amount found due from Krutz) "is all our books show you have to pay; all that Higham says you have to pay; and all Krutz says you have to pay. I consider it a virtual release of your part of the land. The only objection I have to giving you a release is that if it should turn out that Higham's share of the land would not pay the debt, I would have to make it off you."

As the debt was not paid in full, and not considered as being paid in full, it is unnecessary to consider what the effect would have been had the parties intended that an amount less than was actually due should pay the whole debt; but it is well settled that even in that case the payment of a less amount than was due would not have discharged the debt or precluded the appellants from recovering the balance that was in fact due. *Markel's Adm'r v. Spitler's Adm'r*, 28 Ind. 488; *Smith v. Tyler*, 51 Ind. 512. We think the appellants were entitled to a new trial.

Judgment reversed, at the appellees' costs, and cause remanded, with instructions to the court below to grant the appellants a new trial.

Adams, Sheriff, v. Gowan.

No. 10,701.

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ADAMS, SHERIFF, v. GOWAN.

JUDGE PRO TEM.—Appointment.—Collateral Attack.—The appointment by a regular judge of a judge *pro tem.* in a pending cause can not be collaterally questioned by the judgment defendant, who made no objection to the manner of the appointment of the judge *pro tempore* until the filing of his motion for a new trial.

From the Superior Court of Marion county.

J. B. Elam, W. T. Brown and C. F. Robbins, for appellant.
J. Buchanan, for appellee.

ZOLLARS, J.—This proceeding of *habeas corpus* was commenced in the court below by appellee against appellant, who was at the time sheriff of Marion county. The facts stated in the complaint necessary to be noticed in this opinion are briefly as follows:

In April, 1882, an indictment was returned by the grand jury of the criminal court of Marion county, charging appellee with grand larceny and receiving stolen goods. After his arrest he entered into a recognizance and was discharged. On the 20th day of July, 1882, Judge Heller, the regular judge of the criminal court of Marion county, appointed John S. Duncan, Esq., a practicing attorney, judge *pro tempore* of said court. The appointment was in writing, and this, and the proper oath, were recorded in the order-book of the court. It is averred that this appointment was made without the knowledge of or notice to appellee, and solely upon the judge's own motion. After making the appointment, Judge Heller retired from the bench, and the appointee, Duncan, entered upon the discharge of his duties as judge *pro tem.* On the 25th day of July appellee was required by said judge *pro tem.* to answer the charge of the indictment. Appellee entered a plea of not guilty; the case was tried by a jury, a verdict of guilty as charged was returned, and his punishment fixed at two years' imprisonment in the State's prison. Ap-

Adams, Sheriff, v. Gowan.

appellee made his defence without objection to the judge or to the manner of his appointment. After the return of the verdict the judge ordered appellee into the custody of the sheriff, and he was accordingly confined in the jail of the county. On the 29th day of July judgment was pronounced upon the verdict, and the sheriff was ordered to convey appellee to the prison.

It is charged that the entire proceedings of the court were and are illegal and void, for the reason that Judge Heller had no authority to appoint Mr. Duncan judge *pro tem.* in the manner and form adopted. The prayer of the complaint is that a writ issue, and that, upon a hearing, appellee be discharged or let to bail. A proper writ issued on the 3d day of August. On that day appellant brought appellee before one of the judges of the court, and made his sworn return to the writ. In this he stated that he held appellee in custody by authority of an order and judgment of the criminal court of Marion county, which is made a part of the return, and that appellee at no time objected to the legal authority of the judge *pro tem.* until he made his motion for a new trial, which was long after the return of the verdict.

To this return appellee filed a demurrer, which was sustained, and appellant excepted. Declining to make further return, judgment was rendered, discharging appellee from custody. Appellant appealed to the general term of the court, and assigned for error the ruling upon the demurrer. The judgment at special term was affirmed; appellant excepted, and has appealed to this court.

In this court appellant assigns for error the ruling of the court below at general term, and by proper assignment challenges the sufficiency of the complaint.

Appellee has filed no brief in this court. The important question presented by the record, and the only one discussed by appellant's counsel, is, was the judgment of the criminal court, in the case of the State against appellee, legal and valid as against the collateral attack made upon it in this proceed-

Adams, Sheriff, v. Gowan.

No. 10,701.

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ADAMS, SHERIFF, v. GOWAN.

JUDGE PRO TEM.—*Appointment.*—*Collateral Attack.*—The appointment by a regular judge of a judge *pro tem.* in a pending cause can not be collaterally questioned by the judgment defendant, who made no objection to the manner of the appointment of the judge *pro tempore* until the filing of his motion for a new trial.

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Adams, Sheriff, *v.* Gowan.

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Finch v. Bergins.

ing. This enquiry involves the validity of the appointment of Mr. Duncan as judge *pro tem.* of the criminal court. Questions identical with these, in principle, were involved in the recent case of *State, ex rel., v. Murdock*, 86 Ind. 124, and were carefully examined and decided. Applying the reasoning and conclusions in that case to this, the judgment must be reversed, on the ground that the complaint is insufficient, and the court below erred in sustaining the demurrer to the return of appellant to the writ.

The judgment is reversed, at the costs of appellee.

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127	180
89	360
138	305
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89	360
154	80
154	640

No. 10,388.

FINCH v. BERGINS.

PRACTICE.—*Trial by Jury.—Instructions of Court.*—On the trial of a cause by a jury, it is error for the court, in its instructions, to assume the truth of any fact in controversy, or to invade the peculiar province of the jury to determine, for themselves, the credibility of the different witnesses and the weight of their evidence.

From the Newton Circuit Court.

M. H. Walker and I. H. Phares, for appellant.

— *Brown and D. S. Frazer*, for appellee.

HOWK, J.—This was a suit by the appellant to recover the possession of certain real estate alleged to have been unlawfully detained by the appellee, and damages for such detention. The suit was commenced before a justice of the peace of Benton county; and the trial of the cause by a jury, before such justice, resulted in a verdict for the appellee, the defendant below, and judgment was thereon rendered by the justice. From this judgment the plaintiff below appealed to the circuit court of Benton county, where, on the appellee's application, the venue of the cause was changed to the court below. There the cause was set for trial before the Honorable Peter H.

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Ward, as special judge, on the appellee's motion for a change of judge. The cause was again tried by a jury, and a verdict was returned for the appellee; and over the appellant's motion for a new trial, and his exception saved, the court rendered judgment on the verdict.

The overruling of his motion for a new trial is the only error assigned by the appellant in this court. In their argument of this cause the appellant's counsel first complain of an instruction to the jury, given by the court at appellee's request, as follows:

"There have been admitted as evidence before you admissions of the plaintiff tending to show that he had leased the premises as claimed by defendant. With respect to all verbal admissions I instruct you that they ought to be received with great caution. The evidence is subject to much imperfection and mistake. The party himself may have been misinformed, or he may not have clearly expressed his meaning. The witness may have misunderstood him. It frequently happens, also, that a witness, by unintentionally altering a few of the expressions really used, gives an effect to the statement completely at variance with what the party actually did say. Therefore, you should look to the probability of the statement attributed to the party having been made, to the time of the alleged statement, the credibility of the witness by whom the admissions are sought to be proven, to all the circumstances surrounding the admissions, and after applying all the tests at your command to ascertain the truth as to the admissions, and after cautiously considering the admissions, if you believe that the admissions were deliberately made and precisely identified, the evidence afforded thereby is often of the most satisfactory nature."

It is earnestly insisted by the appellant's counsel that the trial court, in the instruction quoted, invaded the province of the jury and assumed that the appellant had made admissions, which were admitted in evidence, tending to establish the appellee's defence. Whether the appellant had made any

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such admissions was one of the disputed questions in the case for the jury to determine, in regard to which the evidence was conflicting. The instruction quoted contains almost a literal transcript of sec. 200 of 1 Greenleaf on Evidence. Of this section of Greenleaf's text, in a similar instruction in *Davis v. Hardy*, 76 Ind. 272, this court said: "To give it in a charge, as written, would in this State, be an invasion of the jury's exclusive right to judge of the credibility and weight of evidence. It is proper matter of argument that such evidence is subject to imperfection and discredit, for the reasons suggested, and the court may direct the jury's attention to the subject. But it is not for the court to say, as matter of law, in reference to the evidence of this kind, given in a particular case, that it is subject to much imperfection; or that 'it frequently happens that the witness, by unintentionally altering a few expressions really used, gives an effect to the statement completely at variance with what the party did say'; or that, where 'the admission is deliberately made and precisely identified, the evidence is often of the most satisfactory nature.' These are matters of fact, experience and argument, but not otherwise the subject of legal cognizance."

So, in *Garfield v. State*, 74 Ind. 60, in commenting on an instruction transcribed, like the one above quoted, from 1 Greenleaf on Evidence, this court said: "It is not every statement of the law found in a text-book or opinion of a judge, however well and accurately put, which can properly be embodied in an instruction. The processes of reasoning by which a conclusion is reached, if well made, are appropriate to be found either in text or opinion, but rarely, if ever, is it proper to deliver such reasoning to a jury in the form of instructions. The instruction under consideration does not contain a single proposition of law, but only declarations of supposed facts, which common experience has perhaps established as true. The teachings of experience on questions of fact are not, however, doctrines of law, which may be announced as such from the bench, nor yet are they matters of proof to be shown as

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other facts in the case. They may well enter into the arguments of attorneys, one side claiming that experience teaches one thing, and the other side asserting another conclusion, but the jury, not the judge, is the arbiter of such contentions, as of all questions of fact. The most that the judge may do, under our practice, which leaves questions of fact entirely to the jury, is to direct the attention of the jurors to such propositions and leave them, in the light of their experience, to say what credit should be given to any testimony on account of its alleged doubtful character." *Nelson v. Vorce*, 55 Ind. 455; *Black v. Duncan*, 60 Ind. 522; *Scott v. State*, 64 Ind. 400; *Jackman v. State*, 71 Ind. 149.

We are of opinion that the court clearly erred in giving the jury the instruction above quoted, and that, for this error of law occurring at the trial and excepted to, and assigned by appellant as a cause for a new trial, his motion therefor ought to have been sustained.

The judgment is reversed, with costs, and the cause is remanded for a new trial and for further proceedings in accordance with this opinion.

89	368
131	560
89	363
145	257

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THE STATE, EX REL. TRAVELLERS INSURANCE COMPANY, *v.*
HARRIS ET AL.

OFFICERS.—To Whom Liable.—An officer is liable for breach of official duty only to the person to whom the duty is owing.

OFFICIAL BOND.—County Treasurer.—Taxes.—A mortgagee can not maintain a suit upon a county treasurer's bond for failure to make taxes of the mortgagor out of his personal property.

SUPREME COURT.—Cross Errors.—Where a complaint is fatally defective, and it appears that no amendment can make it good, the Supreme Court will affirm the judgment on the assignment of cross errors, and will not remand the case with leave to amend.

From the Newton Circuit Court.

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F. H. Levering, A. Wolcott, D. V. Burns and C. S. Denny,
for appellant.

S. P. Thompson and T. Thompson, for appellees.

ELLIOTT, J.—The controlling question in this case is, can a mortgagee maintain an action on the official bond of a county treasurer for the failure of that officer to make taxes assessed against the mortgagor out of personal property owned and held by him within the county?

The failure of the treasurer to levy on personal property does work some injury to the mortgagee, for it adds to the burdens borne by the mortgaged land, and thus lessens the value of the security; but, while this is true, it is also true that the injury is indirect and remote. It is not enough in any case for a plaintiff, who seeks to recover for an injury caused by the negligence of another, to show simply injury and negligence; he must also show that there was a breach of duty owing to him. This general rule applies with peculiar force to persons who sue for injuries caused by official misconduct. It is not every person who sustains an injury from the negligence of a public officer that can maintain an action on the officer's bond.

In general, a public officer is liable only to the person to whom the particular duty is owing, and the ruling question in all cases of the kind is as to whether the plaintiff shows the breach of a particular duty owing to him. It is not sufficient to show a general public duty, or a duty to some other person directly interested. Judge Cooley says: "But the sheriff can only be liable to the person to whom the particular duty was owing; 'the party to whom he is bound by the duty of his office.'" Cooley Torts, 394, n. 1. In another elementary treatise it is said: "It is a general rule that, wherever an action is brought for a breach of duty imposed by statute, the party bringing it must show that he has an interest in the performance of the duty, and that the duty was imposed for his benefit." Shearman & Redf. Neg., section 174. The adjudged cases illustrate and enforce this principle. In *Har-*

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rington v. Ward, 9 Mass. 251, it was said: "No action lies against the sheriff, either for his own default, or for that of his deputy, but at the suit of one to whom the sheriff is bound by the duty of his office. In relation to a suit pending, whether in the service of the original writ, the execution, or any intermediate process, he is answerable for his neglects to none but the plaintiff or the defendant in such suit." The same principle is laid down in the cases of *Compton v. Pruitt*, 88 Ind. 171; *Gardner v. Heartt*, 3 Denio, 232; and *Bank of Rome v. Mott*, 17 Wend. 554. In the last case cited, COWEN, J., said: "The law can not, in such cases, look beyond the proximate mischief resulting to a vested right, and do more than redress that mischief at the suit of the person immediately wronged." The case of *Strong v. Campbell*, 11 Barb. 135, is an interesting and instructive one. It appeared in that case that a statute provided for the publication of the list of uncalled for letters, and that it should be made in the newspaper having the largest circulation in the town. Plaintiffs were publishers of such a paper; publication of the list was denied them, and it was held that they could not maintain an action, the court saying: "To give a right of action for such a cause, the plaintiff must show that the defendant owed the duty to him personally. Wherever an action is brought for a breach of duty imposed by statute, the party bringing it must show that he had an interest in the performance of the duty, and that the duty was imposed for his benefit." If we look to kindred cases we shall find strong support for this view, for the analogy is close and full. Thus, in cases against attorneys for negligence, it is well settled that only the person with whom the attorney contracted can maintain the action, for it is to him alone that he owes a particular duty. *Fish v. Kelly*, 17 C. B. N. S. 194; *Savings Bank v. Ward*, 100 U. S. 195; *Com. v. Harmer*, 6 Phila. 90; *Robertson v. Fleming*, 4 Macq. App. Cas. 167. In *Ware v. Brown*, 2 Bond, U. S. C. C. 267, a notary public had made a false certificate to a deed, and it was held that no one but the party to the original deed could maintain an action.

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So where a recorder gives an erroneous certificate, an action can be maintained only by the person to whom it was given. *Houseman v. Girard, etc., Ass'n*, 81 Pa. St. 252; *Wood v. Ruland*, 10 Mo. 143. Builders of public works are answerable only to their employers for want of skill and care in executing their contract. *Mayor, etc., v. Cunliff*, 2 N. Y. 165; *Pickard v. Smith*, 10 C. B. N. S. 470; *Castle v. Parker*, 18 L. T. Rep. N. s. 367. A railway company is not liable to an interloper for injuries resulting from negligence. *Lary v. Cleveland, etc., R. R. Co.*, 78 Ind. 323, S. C. 41 Am. R. 572; *Everhart v. Terre Haute, etc., R. R. Co.*, 78 Ind. 292 (41 Am. R. 567). In *Winterbottom v. Wright*, 10 M. & W. 109, the plaintiff proved that a mail coach had been defectively constructed; that it was constructed under a contract with a public officer, and that because of its defective construction plaintiff sustained an injury; and the court denied a recovery, upon the ground that the coach-maker owed plaintiff no duty. Lord ABINGER, in the course of his opinion, said: "Unless we confine the operation of such contracts as this to the parties who entered into them, the most absurd and outrageous consequences, to which I can see no limit, would ensue." This corresponds with Judge CLIFFORD's statement, that "There would be no bounds to actions and litigious intricacies if the ill effects of the negligence of men may be followed down the chain of results to the final effect." *Savings Bank v. Ward, supra*. In *Dale v. Grant*, 5 Vroom (N. J.) 142, it was held that an action would not lie in favor of a customer against a wrong-doer, who stopped the machinery of a manufactory and prevented the manufacturer from performing a contract, and thereby caused loss to the plaintiff, to whom the manufacturer had agreed to furnish goods. The court said: "But the law does not attempt to give full reparation to all parties injured by a wrong committed. If this were so, all parties holding contracts, if such exist, under the plaintiffs and who may have been injuriously affected by the conduct of the defendants, would be entitled to a suit. It is only the proximate injury that the law endeavors to compensate; the

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more remote comes under the head of *damnum absque injuria*." Interesting discussions of kindred questions are contained in *Loop v. Litchfield*, 42 N. Y. 351, S. C., 1 Am. R. 543; and *Anthony v. Slaid*, 11 Met. 290.

A departure from these settled and salutary principles would involve us in doubt and confusion; once departed from there would be no rule by which the liability of sureties on official bonds could be measured. Everything would be involved in uncertainty, and sureties might be harassed by actions for causes never contemplated. If we say a mortgagee may maintain an action like this, then is there any reason why a judgment creditor, the holder of a mechanic's lien, the possessor of a vendor's lien, or even the owner of a tax title, might not successfully sue? If we abide not by the settled rules, who shall set limits, and what shall be the guide?

The only case we have found in conflict with the doctrine here approved is *Raynsford v. Phelps*, 43 Mich. 342, and we can not yield to it, although the opinion was prepared by Judge COOLEY, a judge whose opinions are always entitled to respect. It seems to us that the doctrine of that case can not be harmonized with the rule declared in the learned judge's work on torts, to which we have already referred. The error in the decision under immediate mention is, we deferentially submit, clearly proved by the nicely drawn and accurately marked distinctions found in the author's discussion of the liability of recorders of deeds. Cooley Torts, 383, 387.

The case under examination is very different from that of an officer committing a direct and wilful tort, and, as is clearly shown by Judge COOLEY, radically different from that of an officer who has duties imposed upon him directly for the benefit of individuals. It is plain to us that the duty of collecting taxes is imposed upon the treasurer for the benefit of the public, and not for the benefit of individuals.

The complaint states no cause of action, and is so fundamentally bad as to be incurable by amendment, and the case, therefore, is one where the judgment should be affirmed on

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the assignment of cross errors, without remanding it. *McCole v. Loehr*, 79 Ind. 430. As the complaint can not be made good, the appellant can in no event recover, and the result is that the judgment must be affirmed.

Judgment affirmed.

No. 10,589.

**SCOTT ET AL. v. THE STATE, FOR THE USE OF BUSENBURG,
COMMISSIONER OF DRAINAGE.**

DEMURRER.—Answer.—Complaint.—A demurrer to an answer reaches the complaint, and, if the complaint is insufficient, it is error to sustain the demurrer, whether the answer is good or bad.

DRAINAGE.—Commissioner.—Suit for Assessment.—Lien.—Notice.—Complaint.—Demurrer.—A complaint by a drainage commissioner, under section 4277, R. S. 1881, to enforce a lien upon lands for benefits assessed, is insufficient unless it avers that notice of the establishment of the work by the court has been recorded in the recorder's office of the county, as a lien for such assessments does not attach until such notice has been recorded, and this question is presented by a demurrer to the answer.

From the Fulton Circuit Court.

W. Niles and M. R. Smith, for appellants.

M. L. Essick and G. W. Holeman, for appellee.

BEST, C.—The 5th section of the act of April 8th, 1881, provides that a commissioner of drainage may bring suit in the name of the State for his use to enforce a lien upon any land for the amount of benefits assessed upon it, and this suit was thus brought to enforce a lien upon the land of Mary R. Scott, one of the appellants, for the amount assessed by said commissioner in pursuance of the provision of said act. The assessment is the same mentioned in the case of *Scott v. Brackett*, post, p. 413. The complaint consisted of one paragraph. A demurrer for the want of facts was overruled to the complaint. An answer of two paragraphs was filed. The first was a general denial; the other was special. A demurrer was

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sustained to the second paragraph, and an exception reserved. The cause was tried by the court, and, over a motion for a new trial, judgment was rendered for the appellee.

The appellants assign as error that the court erred in overruling the demurrer to the complaint, in sustaining the demurrer to the second paragraph of the answer, and in overruling the motion for a new trial.

The demurrer to the answer reaches the complaint, and, if the latter was insufficient, the ruling upon such demurrer was erroneous, whether the answer was good or bad. *Sugar Creek Tp. v. Johnson*, 20 Ind. 280; *Menifee v. Clark*, 35 Ind. 304; *Lytle v. Lytle*, 37 Ind. 281; *Kretsch v. Helm*, 45 Ind. 438.

It, therefore, becomes unnecessary to examine the answer, as we are of opinion, for the reasons hereinafter given, that the complaint was insufficient.

The 6th section of the act in question provides that "The amount of assessments so made by such commissioner shall be a lien upon the lands so assessed, from the date of recording notice of the establishing of the work by the court. Such commissioner shall, as soon as may be, after he has been directed to construct the work, make out a notice, wherein he shall state that the work has been established by the court; also, the several assessments of benefits to the several tracts of land, as the same have been finally confirmed by the court, and cause the same to be recorded in the office of the recorder of each county where any such lands may be situated. Such recording shall be notice to all the world of such lien from the date thereof."

It will be observed that the assessments made by such commissioner only became a lien upon the land from the time that notice that the work has been established by the court is recorded in the recorder's office of the county where the land is situated. There is no averment in the complaint that any such notice was ever recorded. The only averment in relation to any record is that the commissioner "did, on Octo-

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ber 1st, 1881, assess 85 per cent. of the benefits assessed to the land affected by the ditch, and caused the same to be recorded in the office of the recorder of Fulton county, Indiana." The statute does not require this assessment to be recorded, and this assessment is not the notice required to be recorded by the 6th section of the act. Unless such notice has been recorded no lien attaches, and in order to enforce such lien it must be averred that the notice has been recorded. For want of such averment the complaint was insufficient, and the demurrer should have been sustained to it.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment be and it is hereby in all things reversed, at the appellee's costs, with instructions to sustain the demurrer to the complaint.

No. 10,333.

FOULKS ET AL. v. REED.

VENDOR'S LIEN.—Notice.—Proof of notice of a vendor's lien, acquired by a purchaser in another transaction two years before his purchase, is not sufficient to charge the lands with the lien, as against him.

From the Daviess Circuit Court.

O. H. Cobb, J. H. O'Neill and D. J. Hefron, for appellants.

FRANKLIN, C.—Appellee, James Reed, sued appellant Hiram Foulks, with one Richard Reed, in the Knox Circuit Court, to recover a judgment against said Richard Reed for the consideration agreed to be paid by said Richard to James for certain real estate conveyed by said James to said Richard, and to have the judgment declared a vendor's lien upon the real estate in the hands of appellant Foulks, alleging him to be a subsequent purchaser of the real estate, with notice of appellee's vendor's lien. Richard Reed was defaulted. Appellant filed an answer in general denial, and the venue was

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changed to the Daviess Circuit Court. There was a trial by jury, and a verdict returned in favor of the plaintiff, and, over a motion for a new trial, judgment was rendered for the plaintiff. The error assigned is the overruling of the motion for a new trial.

The reasons stated in the motion for a new trial are, that the verdict was not sustained by the evidence, and is contrary to law.

The parties filed an agreed statement of the facts of record as follows: "It is agreed that on the 19th day of December, 1878, James Reed was the owner of the real estate mentioned in plaintiff's complaint, and that on said 19th day of December, 1878, James Reed conveyed said real estate to Richard Reed by warranty deeds, and that the consideration expressed therein was \$2,200, and that said deeds contained no stipulations with reference to any purchase-money; that on the 16th day of January, 1879, Richard Reed mortgaged said real estate to Bernhard Kuhn, Sr., to secure payment of \$600, with interest at ten per cent. thereon till paid; and that on the 12th day of July, 1879, said Kuhn died, and that afterwards Sarah Kuhn became his administratrix; and that at the February term, 1880, of the Knox Circuit Court, Sarah Kuhn, administratrix of said Bernhard Kuhn, obtained a decree of foreclosure of said mortgage; and that on the 15th day of May, 1880, the clerk of the Knox Circuit Court issued a copy of said decree to the sheriff of Knox county, Indiana; and that on the 12th day of July, 1880, said sheriff, by virtue of said decree, sold said real estate to said Hiram A. Foulks for the sum of \$660, and gave to said Foulks a certificate of purchase in ordinary form; and that on the 12th day of July, 1881, the said sheriff executed to said Foulks a deed for said real estate, on presentation of said certificate; and that said Foulks is the legal owner of said real estate."

Richard Reed testified that he was the son of the plaintiff James Reed; that he was a single man, and had all the time lived with his father, on the premises named; that he pur-

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chased the land of his father, and agreed to pay him for it \$1,316, in instalments of \$100 per annum, until paid, and he received deeds from his father; that it was a part of the consideration for the land that his father was to continue to live with him on the land, and have a small piece to cultivate each year; that he then sought to mortgage the land, and went to appellant Foulks to learn where he could obtain a loan, and he sent him to Bernhard Kuhn, Sr.; he went to see Kuhn, and told him his wants; told him that he had bought the land of his father, but owed the purchase-money for it, who referred him back to Foulks, to get an abstract of title, and arrange for the loan. Foulks told him the land was misdescribed, and he must get new deeds, according to a survey, from his father, which he did. He took the new deeds to Foulks, who made an abstract of the title; he then told Foulks that the purchase-money for the land was unpaid; his father knew nothing about the mortgage, and he never paid any part of the purchase-money. After the mortgage was executed Kuhn paid out of the loan of \$600 \$50 to Foulks for his services, \$90 to Kuhn for a horse, \$150 for taxes on the land, and the balance to the mortgagor.

James Reed, the appellee, testified that he knew nothing of the mortgage until he saw the land advertised for sale under the foreclosure proceedings; that he did not attend the sale or pay any further attention to it; had no money to buy the land or redeem it from the sale. He also testified as to the terms of the sale to his son, the same as testified to by the son, and that there was no note or other evidence of indebtedness given for the consideration-money.

B. Kuhn, Jr., testified that he was a nephew of the deceased, and did business for his uncle; that he made the loan in question himself; that the matter was left to him and Foulks, who recommended the title to be all right, and wrote the mortgage. He let Richard Reed have the horse for which the \$90 was paid, and corroborated the testimony of Richard Reed as to

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the payment of the remainder of the loan ; that he never heard about any of the purchase-money being unpaid until after the sheriff had made the sale to Foulks.

Foulks testified that Richard Reed never told him that any part of the purchase-money was unpaid, but told him that there were no liens of any kind on the land, and that he told B. Kuhn, Jr., that the title was all right and clear of encumbrances, and the loan was made accordingly. The retaining of the possession by the grantor, being apparently joint with the grantee, was not constructive notice to an innocent purchaser in fact, of any secret claim or lien that the grantor might have upon the land. His possession was not obviously inconsistent with that of the grantee, and might be considered as the facts would warrant. Possession, in order to be notice to a subsequent purchaser, must be open, notorious and exclusive, under an apparent claim of ownership. Wade Notice, sec. 273, *et seq.*; see sec. 290. And in this case there is no evidence showing that at the time of the sheriff's sale appellant had any knowledge of appellee's possession of the premises.

The evidence tended to show that Bernhard Kuhn, Sr., at the time he took the mortgage, had actual notice that the purchase-money was unpaid, although that was inferentially contradicted by Bernhard Kuhn, Jr. The evidence also tended to show that Foulks had notice at the time of the execution of the mortgage that the purchase-money was unpaid, though this is squarely contradicted by Foulks ; but this court can not weigh the testimony ; that was a question for the jury and the court below to determine. The question presented to this court is, was such notice to Foulks sufficient to charge the land in his hands with a vendor's lien for the purchase-money ? There was no attempt to prove actual notice to Foulks of there being any unpaid purchase-money at the time he purchased the land at the sheriff's sale, some eighteen months after the execution of the mortgage. If it be admitted that Richard Reed told him of the unpaid purchase-money at the

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date of the execution of the mortgage, he was then only acting as agent of one of the parties, had no personal interest in the matter at that time, and had no negotiations pending by which he might become interested. He only acted as scrivener in the execution of the mortgage, and had no interest in charging his memory with what was said or done, and if the purchase-money was then unpaid, that does not raise a presumption that it remained unpaid at the time of the sheriff's sale. The execution of the mortgage was an entirely different transaction, so far as appellant was concerned, from his subsequent purchase of the land, and he may have forgotten what was said at the time of the execution of the mortgage.

In 2 Sugden Vendors, 8th Am. ed., bottom p. 755, it is said that the purchaser of the land will not "be bound by notice in a previous transaction which he may have forgotten ;" and again it is said by the same learned author, that "the notice to the purchaser must be in the same transaction ;" and further, "to constitute a binding notice, it must be given by a person interested in the property, and in the course of the treaty for the purchase."

The case of *White v. Fisher*, 77 Ind. 65 (40 Am. R. 287), is very similar to the one under consideration, and it was there held that the facts were not sufficient to charge the purchaser with notice of the vendor's lien. We think appellee lost his vendor's lien by not giving some notice thereof at or in a short time before the sheriff's sale to appellant. He saw the advertisement and knew of the time of the sale, but gave no further attention to it, and acted as though he was willing for some innocent person to purchase the land. We think that there was an entire failure in the evidence to prove notice to Foulks of appellee's vendor's lien at the time of the purchase of the property by appellant at the sheriff's sale, for which a new trial ought to have been granted to appellant. The court erred in overruling the motion for a new trial. The judgment as to appellant ought to be reversed.

PER CURIAM.—It is therefore ordered, upon the foregoing

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opinion, that the judgment of the court below be and it is in all things reversed as to the said appellant, at the costs of appellee, and the cause is remanded, with instructions to the court below to grant appellant a new trial, and for further proceedings in accordance with this opinion.

No. 9659.

**JEFFERSONVILLE, MADISON AND INDIANAPOLIS RAILROAD
COMPANY ET AL. v. BARBOUR ET AL.**

CONVEYANCE.—Condition Subsequent.—Construction.—A condition subsequent is not favored, and is therefore very strictly construed.

SAME.—Forfeiture.—A conveyance of lands recited that it was made "expressly for the use and purpose of depot grounds for the M. & I. railroad," and that if there should be a failure to erect buildings and occupy it for that purpose, the land should revert to the grantors. After the erection of buildings and use of the land for the purpose specified for thirty-three years, it ceased to be so used, and a new location was made. *Held*, that the condition was performed, and there was no forfeiture.

From the Bartholomew Circuit Court.

S. Stansifer and W. D. Stansifer, for appellants.

J. B. Reeves and N. R. Keyes, for appellees.

HAMMOND, J.—The appellees brought this action against the appellants to quiet title to a certain described tract of ground. It is averred in the complaint that on April 19th, 1841, certain parties under whom the appellees, as heirs and devisees, claim title, conveyed by deed, subject to certain conditions, the tract of ground in controversy to the State of Indiana, for the use of the Madison and Indianapolis railroad. A copy of the deed, filed with the complaint, reads as follows:

"This indenture, made this nineteenth day of April, in the year of our Lord one thousand, eight hundred and forty-one, between John M. Gwin and Mary Ann, his wife, of the county of Bartholomew; Lucius Barbour and Harriet L. Barbour,

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his wife, of the city of Madison; Harry Case, Edward Case, Volney G. Barbour, of the State of Connecticut, by said Lucius Barbour, their attorney in fact, and Edward M. Beckwith, formerly of Indiana, by Courtland Cushing, of the city of Madison, aforesaid, his attorney in fact, of the first part, and the State of Indiana, of the second part, witnesseth that said parties of the first part, for and in consideration of the sum of five dollars, lawful money of the United States, to them in hand paid by said parties of the second part (the receipt whereof is hereby acknowledged) have granted, bargained and sold, aliened, released, conveyed and confirmed, and by these presents do grant, bargain, sell, alien, release, convey and confirm unto said party of the second part, their heirs and assigns forever, all and singular, the following described tract or parcel of ground lying and being adjoining the town of Columbus, county of Bartholomew and State of Indiana, to wit:" (Here follows description of land.) "The above ground is deeded to the State of Indiana expressly for the use and purpose of depot grounds for the Madison and Indianapolis railroad. Now, therefore, be it known, that in case the State of Indiana shall fail to erect buildings and occupy said ground for the use and purpose above mentioned, then and in that case the above specified ground shall revert back to the donors. All the fencing and buildings that may be on said grounds are reserved and not intended to be sold, together with all and singular the privileges and appurtenances to the same belonging or in any wise appertaining, and the rents, issues and profits thereof, and all the estate, right, title, interest, claim and demand whatsoever of the said parties of the first part in, upon and to said premises, and every part thereof, to have and to hold the premises hereby bargained and sold, or meant or intended so to be, with the appurtenances, to said party of the second part, his heirs and assigns, to the only proper use and behoof of said party of the second part, their heirs and assigns forever, and the said parties of the first part, for themselves, their heirs, executors and administrators, do cov-

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enant, promise and agree to and with said party of the second part, their heirs, executors, administrators and assigns, that they are the true and lawful owners of the said premises hereby granted, and have good right, full power and lawful authority to sell and convey the same in manner and form aforesaid; and further, that they, the said parties of the first part, for themselves, their heirs, executors and administrators, will warrant and forever defend the aforesaid premises, with the appurtenances and every part thereof unto the said party of the second part, their heirs and assigns, against all person or persons whomsoever, lawfully claiming or to claim the same by, from or under them, or any of them, or by, from or under any other person or persons whomsoever.

"In witness whereof the said parties of the first part have hereunto set their hands and seals the day and year above written."

The deed was signed by the grantors, acknowledged and recorded. Proper averments are made, showing that the appellants have succeeded to the rights of the State and of the Madison and Indianapolis railroad. The complaint charges that the railroad for whose use the deed was made took possession of the lot under the deed and erected a depot thereon, which remained until 1874, "at or about which time said company ceased to maintain any depot building thereon, and since said time said ground has never been used for depot purposes, and other and different grounds have been used for a depot for said company in Columbus, Indiana." The appellees aver that before bringing this action they demanded of the appellants entry and possession of said premises, which the appellants refused to give.

The appellants' demurrer to the complaint was overruled. They then answered in eight paragraphs, and also filed a counter-claim. To each paragraph of the answer and to the counter-claim the appellees' demurrer was filed and sustained. These several rulings were excepted to by the appellants, and are assigned as error in this court.

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The appellees claim that, under the condition in the deed, it was the duty of the railroad company not only to erect buildings upon, but perpetually to occupy, the lot described in the deed as depot grounds; and that the failure to do this since 1874 entitled the appellees to re-enter for condition broken. The appellants, upon the other hand, deny the perpetuity of the condition. They claim that the erection of the buildings and the occupancy of the lot for depot purposes, in a reasonable time after the execution of the deed, and the continued possession thereof for such purposes for thirty years, avoided the condition and made the estate absolute.

Conditions subsequent are not favored in law. They are strictly construed. *Hunt v. Beeson*, 18 Ind. 380. The authorities are unanimous in holding that conditions subsequent require unusual strictness of construction. "A court of equity," says Chancellor Kent, "will never lend its aid to divest an estate for the breach of a condition subsequent. The cases, on the contrary, are full of discussions, how far chancery can relieve against subsequent conditions." 4 Kent Com. 130.

The rule of strict construction applicable to the case at bar does not require us to hold that the railroad for all time to come was bound to use the premises for depot purposes. No time was fixed in which it was to erect the buildings and occupy the lot as depot grounds. In such case the law required the performance of these acts within a reasonable time. The complaint shows that the railroad complied with this requirement. It took possession at once under the deed, erected the buildings and occupied the ground for depot purposes for thirty years. This, we think, was a substantial compliance with the condition of the deed. Had the grantors intended that the lot should be occupied by the railroad for all time to come for depot purposes, words suitable to express such intention would have been employed. General rules of interpretation require a deed to be construed most strongly against the grantor. Since no time was fixed for the occupancy of the lot to continue for depot purposes, we think that the par-

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ties must have intended that it should be for a reasonable time. It may be presumed that when the conveyance was made the grantors owned other contiguous real estate, the value of which they supposed would be increased by the occupancy of the lot conveyed as depot grounds. This action was brought nearly thirty-eight years after the execution of the deed. There is no averment in the complaint that the appellees have been damaged by the failure of the railroad, since 1874, to use the premises for depot purposes. It is not, under the circumstances, unreasonable to suppose that the grantors received, in the occupancy of the lot as depot grounds for thirty years, all the benefits and advantages which they anticipated when they made the conveyance.

In determining whether a condition subsequent in a deed has been broken or not, construction is required in nearly every case. But little assistance can be had from examining other cases, except to ascertain rules for interpretation. Each case differs so widely from all others that even rules of construction can not be wholly depended upon. The application of good sense and sound equity are as much to be relied upon as subtle and artificial rules of construction. The point, of course, to be arrived at in every case, is to ascertain the intention of the parties. And we may suppose in this case, from the language of the deed and the surrounding circumstances of the transaction, so far as they are disclosed in the complaint, that the grantors' object in the conveyance was satisfied in the occupancy of the premises by the railroad, for depot purposes, for a period of time nearly equal in duration to the average of human life.

In *Hunt v. Beeson, supra*, Hunt had donated to Pugh a lot for the purpose of erecting a tanyard on it. A tanyard was erected and maintained twenty-four years on the lot, and then discontinued. An action for forfeiture of the premises was brought; but this court held that the condition had been complied with, and that the estate in the grantee had become absolute. The court, in that case, says: "Thus for twenty-four

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years was the property used for the purposes of a tanyard. It may reasonably be supposed that the donor, having in view the future growth, business and prosperity of the town, expected that the business of tanning would be carried on upon the lot after the erection of the tanyard, for an indefinite length of time. This expectation, it seems to us, has been fully met, and the objects and purposes of the donation fully carried out. We do not think that it can be held that a failure to further use the lot as a tanyard lot, or an appropriation of it to other purposes, can work a forfeiture of the estate."

The case of *Mead v. Ballard*, 7 Wal. 290, was a conveyance containing a much stronger condition than the one under consideration. The deed was made by Mead's ancestor to Amos Lawrence. The condition was in these words: "Said land being conveyed upon the express understanding and condition that the Lawrence Institute of Wisconsin, chartered by the Legislature of said Territory, shall be permanently located upon said lands, and on failure of such location being made on or before the 7th day of September, 1848, and on repayment of the purchase-money without interest, the said land shall revert to and become the property of said grantors." The board of trustees, on August 9th, 1848, passed a resolution locating the institute upon the lot described in the deed. Contracts were made and buildings completed by November, 1849, at a cost of \$8,000. The buildings were destroyed by fire in 1857 and never rebuilt, and those, in the mean time erected on another lot, were afterwards used for the institute. It was held in the action by Mead to recover for condition broken, that the institute had so complied with the terms of the deed as to avoid the condition and make the conveyance absolute.

These cases are strongly in point, and we think fully sustain our position that there was, in the case before us, a compliance with the condition of the deed sufficient to prevent a forfeiture. Indeed, it is not necessary for us in this case, in holding that the condition of the deed has been complied with,

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to go to the extent of the doctrine announced in *Mead v. Ballard*, *supra*. The case at bar is to be distinguished from *Indianapolis, etc., R. W. Co. v. Hood*, 66 Ind. 580. In that case the consideration of the conveyance was the "permanent location and construction of the depot" of the grantee upon the lots conveyed. It was also stated in the deed in that case, that the lots were conveyed "for a site for the depot" of the grantee, and the words of the *habendum* were, "to have and to hold the premises aforesaid, with the appurtenances, to the said party of the second part, for the purposes aforesaid." The *purposes* were a site for a depot, and the permanent location and construction of a depot on the grounds conveyed; in other words, from the language used in the deed, it was clearly the intention of the parties in that case that the grantee's depot on the lots should be continued for all time, or that the lots should revert to the grantors. The condition of the grant in the present case was in effect that the grantee should locate and occupy the lots as depot grounds. No time was mentioned, and the language does not, strictly construed, mean perpetuity. We think thirty years' occupancy of the lots as depot grounds was a substantial compliance with the condition.

For the reasons which we have given for holding the appellees' complaint bad, we think that the appellants' counter-claim was good on demurrer, and that the court below erred in sustaining a demurrer to it.

We feel compelled to hold that the appellees' complaint was insufficient, and that the demurrer to it should have been sustained. This makes it unnecessary to examine other alleged errors.

The judgment of the court below is reversed, at the appellees' costs, and cause remanded, with instructions to sustain the appellants' demurrer to the appellees' complaint, and to overrule the appellees' demurrer to the appellants' counter-claim, and for further proceedings not inconsistent with this opinion.

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89	383
127	94
89	382
139	15
92	382
165	242

No. 9771.

ELROD ET AL. v. KELLER ET AL.

PARTITION.—Tenants in Common.—Improvements.—Payment for.—Where one tenant makes valuable and lasting improvements upon the common property without the knowledge or consent of his cotenant, he can not compel such cotenant to contribute anything toward the payment of such improvements.

SAME.—Allowance for Improvements.—When a tenant has made improvements without the consent of his co tenant upon a portion of the common property, a court of equity, in making partition of such property, will set apart to such tenant the portion so improved by him, if it can be equitably done.

SAME.—Where improvements thus made affect the entire property, compensation will not be made upon partition unless the improvements were necessary or useful to the enjoyment of the estate.

SAME.—Where improvements are thus made upon property not susceptible of division, no allowance will be made for such improvements from the proceeds of such property, unless such improvements were made with knowledge and without objection from the cotenants, or were necessary to the enjoyment of the estate, or were made under such circumstances as create an equitable claim for them.

From the Montgomery Circuit Court.

A. Thomson, T. H. Ristine and H. H. Ristine, for appellants.
J. M. Thompson and W. H. Thompson, for appellees.

BEST, C.—The appellants, Elizabeth Elrod and her husband, Martha B. Lewis and her husband, and Joseph W. Vancleave, brought this action against the appellees, Annetta Keller and Daniel Keller, her husband, for the partition of certain lands alleged in the complaint to be held by them as tenants in common and to be indivisible.

Annetta Keller filed a cross complaint, in which she alleged that she had been in the possession of said lands for the last eight years, and that during that time she had, with the consent of her cotenants, made permanent improvements upon said lands of the value of \$1,000, for which she claimed a lien as against her cotenants, and asked to be allowed said sum out of the proceeds of said property before division among the parties.

Elrod et al. v. Keller et al.

The land was sold and the proceeds paid to a commissioner, after which the appellants filed an answer to the cross complaint, in which they allege that said Annetta and her husband rented said premises of her cotenants in 1871, for which they agreed to pay them \$125 per year; that they at once took possession of said lands, and have since continued in possession of them under said contract; that said lands were at the time well improved, and that the improvements since made were made by them for their own convenience, without the appellants' consent; that they have committed waste upon the land by cutting timber thereon of the value of \$300, and that \$500 of rents remain unpaid, all of which they ask may be deducted from said Annetta's share of the proceeds arising from the sale of said lands.

The issue thus formed was submitted to the court, with a request that the court find the facts specifically and state its conclusions of law thereon. This was done. The facts found are these:

1st. That Benjamin McMullen died in 1855 the owner in fee of the premises described in the complaint.

2d. That he left surviving him his widow, Elizabeth Elrod, and five children, viz., Martin, Joseph and Mary McMullen, Martha B. Lewis and Annetta Keller.

3d. That in 1872 Martin McMullen died intestate, without issue.

4th. That in 1879 Mary McMullen sold her interest in said land to Annetta Keller, and Joseph McMullen sold his interest to Joseph W. Vancleave.

5th. That on the 1st day of March, 1871, Annetta Keller and her husband rented all of said land except the interest of Annetta, and agreed to pay therefor \$125 per annum.

6th. That said Daniel and Annetta Keller at once went into possession of said premises under said contract, and continued in possession until the 19th day of October, 1879, when the same was sold by the commissioner in this cause, who now holds the proceeds of said sale to be distributed to the several owners.

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7th. That after said Kellers went into possession of said premises said Annetta made the following permanent and valuable improvements and repairs upon said premises to wit:
Erected a barn, of the value of \$140.00
Planted an orchard, of the value of 50.00
Cleared seven acres of land, of the value of 52.50
Made fences, new rails, of the value of 61.50
Moved and repaired house, of the value of 91.00
Dug and walled well, of the value of 30.00

8th. That at the time said Annetta and her husband took possession there was a log-house and an unwalled well upon said premises.

9th. That said improvements were made without the knowledge or consent of said Elizabeth Elrod and Martha B. Lewis, both of whom were non-residents of the State of Indiana.

10th. That Joseph McMullen had knowledge of said improvements, but that Joseph W. Vancleave, at the time he purchased said interest, had no notice of any claim for improvements.

11th. That said Kellers, while in the possession of said land, paid \$83.34 as taxes thereon, and cut timber from said land of the value of \$86.

12th. That there is due Elizabeth Elrod as rent \$50, and there is due Martha B. Lewis as rent \$150.

13th. That said Kellers have had the exclusive benefit of said improvements since they were made, and have paid nothing for the use of them in addition to the \$125 per annum.

The court, upon the foregoing facts, concluded that said Annetta was entitled to the sum of said improvements and the taxes paid, to wit, \$508.34, less the value of the timber cut and the rent due said Elizabeth Elrod and said Martha B. Lewis—in all \$286—and ordered the commissioner to pay her out of the proceeds of said sale the difference, to wit, \$222.34.

An exception was properly taken to the conclusion of law, and this is assigned as error.

The appellees concede in this case that if no relation ex-

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isted between said Annetta and the appellants other than that of landlord and tenant, the conclusion of the court can not be maintained, and hence no attention will be given to this branch of the case.

It is insisted, however, that, inasmuch as she was a cotenant in the premises, she is entitled to recover the value of the improvements made, whether made with or without the consent of her cotenants. This the appellants deny, and this is the question for decision.

The statute in force at the time these improvements were made provides that "If a joint tenant or a tenant in common, or tenant in coparcenary have, by consent, management of the estate, and make with knowledge, and without objection of his cotenant or coparcener, useful or necessary improvements, the cotenant or coparcener shall contribute ratably thereto."

Under this statute, upon the facts found, the appellee Annetta could not compel her cotenants to contribute anything toward the payment of the improvements made.

Nor could payment be enforced by the general principles of the law, in the absence of the statute. *Lane v. Taylor*, 40 Ind. 495; *Taylor v. Baldwin*, 10 Barb. 582; *Scott v. Guernsey*, 48 N. Y. 106; Freeman Cotenancy & Partition, section 262.

Where one tenant has made improvements upon a portion of the common property without the consent of his cotenants, a court of equity, in making partition of the property, will set apart to such tenant the portion so improved if it can be equitably done. Freeman Cotenancy & Par., section 509, and authorities there cited.

Where improvements are thus made which affect the entire property, compensation will not be made upon partition unless the improvements were necessary or useful, as this would be but another mode of compelling contribution. *Nelson v. Clay*, 7 J. J. Mar. 138; Freeman Cotenancy & Par., sec. 510.

Where improvements are thus made upon land not suscep-

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tible of division, and the improvements are not found to have been necessary to the enjoyment of the estate, can the value of them be allowed to the party making them from the proceeds arising from a sale of the land? This question must, we think, be answered in the negative. The appellees insist that the cases of *Stafford v. Nutt*, 35 Ind. 93, *Martindale v. Alexander*, 26 Ind. 104, and *Green v. Putnam*, 1 Barb. 500, hold that such allowance may be made. In this we think they are mistaken.

In *Stafford v. Nutt*, no question arose as to the right to recover for improvements made. This was conceded, and the only question decided was that a cotenant, to whom a full share had been allotted before the value of improvements were ascertained, had the right to pay his proportion of the value of such improvements, and thus prevent a re-division of the property.

In *Martindale v. Alexander*, it was held that a cross complaint for improvements made upon the common property, which alleged that they were made with the knowledge and consent of the cotenants, was sufficient upon demurrer.

In *Green v. Putnam*, a tenant who had consented to the erection of a building of a certain size upon the common property objected to the erection of a larger one, when that fact was learned, and in a proceeding for partition it was held that the tenant making the improvements was only entitled to the value of the smaller building.

In each of these cases language was employed which seems to support the position of the appellees, but, as this was unnecessary to the decision of the questions involved, it can not change or affect the decisions actually made. The decisions made in each of these cases do not support, but are opposed to, the position maintained by the appellees.

In addition to this the case of *Green v. Putnam*, from which the language in *Martindale v. Alexander*, *supra*, above alluded to, was taken, was reviewed in *Scott v. Guernsey*, 48 N. Y. 106, and it was there said that the ground, upon which the allowance for improvements in such case was made, was the consent of the cotenant. It, therefore, can not be said, as we

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think, that these cases hold that an allowance will be awarded for such improvements made under the circumstances stated, and we know of no case that goes to this extent.

There is a line of cases holding that where a tenant makes improvements upon common property which is indivisible, a court of equity, upon a sale of the property, will allow such tenant the amount such property is enhanced in value by such improvement at the time of sale. *Dean v. O'Meara*, 47 Ill. 120; *Kurtz v. Hibner*, 55 Ill. 514 (8 Am. R. 665); *Moore v. Williamson*, 10 Rich. Eq. 323.

The facts found do not bring this case within the rule announced in the above cases. It is not found how much the property was enhanced in value by the improvements made. The value of the improvements is found, but it does not follow that the property was enhanced in value such sum at the time of sale or at the time they were made. Indeed, the nature of some of the improvements forbids any such conclusion if made any considerable length of time before the sale. The value of the property as improved is not found, and, for aught that appears, the allowance made may exhaust the entire proceeds of the sale. It is true that the order to pay the appellee Annetta \$222.34 before distribution implies that something will remain; but she is also allowed the amount of rents due appellants, and there is nothing found to show that this allowance will not exhaust the entire proceeds of the sale. This is not, probably, the case, but the fact that it does not otherwise appear shows that the facts found do not authorize the conclusion drawn. The facts found do not, therefore, bring the appellee within this rule.

It is also well settled that if improvements are made under the mistaken belief that the tenant owns the land, an allowance will be made in proceedings for partition for the amount that the land is enhanced in value. 1 Story Eq. Jur., sec. 655; *Conklin v. Conklin*, 3 Sandf. Ch. 64; *Scott v. Guernsey, supra*, and authorities cited.

No such fact appears in this case, and, in the absence of a finding that they were made with notice and without objec-

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tion from the cotenants, or were necessary to the enjoyment of the estate, or were made under such circumstances as create an equitable claim for them, no allowance can be made for them. It may seem that if the improvements enhance the value of the estate, and this fact can be ascertained, the appellee is equitably entitled to the enhanced value of the property, but a determination of this question, which is nearly if not always a disputed question of fact, imposes upon cotenants, without their consent and to their prejudice, a burthen from which they derive no benefit and which they are compelled to assume to protect their interests. Aside from the fact that a tenant has no legal right to the benefits of improvements thus made, this is a sufficient reason why the claim should not be entertained. This view does no injustice to the tenant who desires to make improvements. If he desires to do so he may notify his cotenants, and if they fail to object, or if the improvements are necessary to the enjoyment of the estate, they may be made without risk. If unnecessary, and the consent of the cotenant can not be obtained, the estate may be severed. The mere fact, therefore, that improvements enhance the value of the common property, does not entitle the tenant making them to an allowance for the difference in value, and if this fact were found it would not warrant the allowance.

It is not found in this case that the improvements were necessary, and this can not be inferred from the fact that they were valuable; nor can this fact be inferred from the nature of them though they, or some of them, are such as may have been necessary, and this fact should be found in order to do substantial justice between the parties. The judgment should, therefore, be reversed, and a new trial ordered.

PER CURIAM.—It is ordered, upon the foregoing opinion, that the judgment be and it is hereby reversed, at the appellees' costs, with instructions to order a new trial.

Opinion filed at the November term, 1882.

* Petition for a rehearing overruled at the May term, 1883.

Williamson v. The Kokomo Building and Loan Fund Association.

No. 10,042.

WILLIAMSON v. THE KOKOMO BUILDING AND LOAN FUND ASSOCIATION.

CORPORATIONS.—Defective Organization.—Mortgage.—A junior mortgagee can not defeat a senior mortgage by showing that the corporation to which the senior mortgage was executed was defectively organized, if it be a corporation *de facto*.

89	389
124	403
89	389
123	400
89	389
150	440
89	389
155	64
155	65
89	389
160	563

SAME.—Collateral Attack.—Where the law authorizes a corporation, and there is an attempt in good faith to organize, and corporate functions are thereupon exercised, though some formalities required by law in the organization have been omitted, there is a corporation *de facto*, the legal existence of which can not ordinarily be questioned collaterally.

SAME.—Building Associations.—A building association filed its articles of association in the proper recorder's office, and a certified copy, instead of a duplicate as the statute requires, in the office of the Secretary of State, and then assumed the exercise of corporate functions, and took a mortgage.

Held, that a junior mortgagee could not question the corporate existence for the purpose of defeating the mortgage of the association.

From the Howard Circuit Court.

M. Bell, C. E. Hendry and D. A. Woods, for appellant.

R. Vaile and J. F. Vaile, for appellee.

ELLIOTT, J.—Articles of association, signed and acknowledged as the law requires, were filed in the proper recorder's office, but instead of filing a duplicate in the office of the Secretary of State as the statute provides, a certified copy was there filed. After this had been done, the association, calling itself The Kokomo Building and Loan Fund Association, assumed corporate functions, and in the course of corporate business received from Lewis W. Leach a mortgage on land. Subsequent to the execution and recording of this mortgage, Leach executed another mortgage to appellant on the same land.

The contention of appellant is, that as the association filed a certified copy, and not a duplicate, of its articles of association in the office of the Secretary of State, it never became a corporation, and the mortgage executed to it is void.

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Where persons assume to incorporate under the laws of the State, and in part comply with their requirements, assume corporate functions and transact business as a corporation, private persons can not collaterally question the right of such an association to a corporate existence, although there has not been a full compliance with the provisions of the statute. *Baker v. Neff*, 73 Ind. 68. This rule is not limited to cases where one by contract admits corporate existence, but is a rule of general application. In *Cochran v. Arnold*, 58 Pa. St. 399, it was said: "If there is anything settled it is that the corporate existence of a corporation *de facto* can not be inquired into collaterally. Upon this subject the authorities are too numerous to admit of citation." "Two things," it was said by the Court of Appeals of New York, "are necessary to be shown in order to establish the existence of a corporation *de facto*, viz.: 1. The existence of a charter, or some law under which a corporation with the powers assumed might lawfully be created; and, 2. A user by the party to the suit, of the rights claimed to be conferred by such charter or law." *Methodist Episcopal Union Church v. Pickett*, 19 N. Y. 482. It is said, by a recent writer, that, "Admitting that the proceedings had, with a view to secure the corporate character, were so defective or tainted with fraud, and that the building association's conduct had been such, as to make it liable to the loss of its franchises, it belongs to the State, and to the State alone, by a proceeding instituted for that purpose, to enforce the penalty; and the building association, until, by judicial sentence, its charter is declared void, is a corporation *de facto*, and no private person, more especially no person dealing with it, can be permitted to say, that it is not also a corporation *de jure*." Endlich Building Ass'ns, section 504. Another writer, in discussing the question of what proof is necessary to establish a corporation with respect to strangers, says: "It is ordinarily necessary to show that the corporators have adopted a charter or articles of association of some kind, and have

Williamson v. The Kokomo Building and Loan Fund Association.

held themselves out to the world as a properly constituted corporation." Morawetz Private Corp., section 139.

The rule stated by us does not go to the extent of precluding strangers from showing that there was no law authorizing a corporation, nor from showing that there was no attempt at corporate organization, nor any assumption of corporate powers. *Oroville, etc., R. R. Co. v. Plumas Co.*, 37 Cal. 354. Where, however, the acts done by persons assuming to act as a corporation are such as to constitute them a *de facto* corporation, a collateral attack by a private person will, as a general rule, be unavailing. Without attempting to define what a *de facto* corporation is, we adjudge that an association may be regarded as a *de facto* corporation, where there is a law authorizing the creation of a corporation of its class and powers, and where there is an attempt, in good faith, to comply with the law, and the only error is in filing a certified copy of the articles of association, instead of a duplicate, with one of two designated depositaries, and where there is also an exercise of corporate functions. This would exclude all associations which no law authorized to be incorporated, and all associations attempting to exercise corporate rights without an effort to obey the law, but would not exclude associations where there was a law authorizing an incorporation, and where there was an effort to organize under the law, and nothing more than a mere defect or irregularity in the proceedings. Where one by contract estops himself, a still different rule applies, but of such cases we are not now speaking.

There are some apparent and some real exceptions to the general rule. An apparent exception is, that subscribers to preliminary articles of association may, in a suit for their subscriptions, deny the corporate existence; an analysis, however, will show that there is no real conflict between the principles which govern in such cases and those which underlie our general rule, for in the former class the condition precedent to the right of recovery is that there should be a *de jure* corporation, and this is not a provision of a law but a condition of

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a contract. *Richmond Street R. R. Co. v. Reed*, 83 Ind. 9; *Indianapolis, etc., Co. v. Herkimer*, 46 Ind. 142, *vide p. 149*. A real exception to the rule is that a corporation *de facto* has no special or extraordinary powers, such as the right to condemn land, although upon this point there is some conflict of authority. *Morawetz Private Corp.*, section 147, auth. n.; *Aurora, etc., R. R. Co. v. Miller*, 56 Ind. 88. But whatever may be the limits of the rule, we think it clear that a junior mortgagee can not defeat a prior mortgage by proving a defect in the organization of the association to which the senior mortgage was executed.

The view we take of the case renders it unnecessary to consider the other questions discussed.

Judgment affirmed.

No. 9709.

KEPLER v. CONKLING ET AL.

89 302
137 510

INTEREST.—Usury.—Recoupment.—Statute Construed.—Usury paid while the act of 1861 (1 R. S. 1876, p. 600) was in force, can not be recouped in a suit brought for the debt after the act of 1879 (Acts 1879, p. 43) took effect. **SUPREME COURT.—Reversal of Judgment.—Error.**—Affirmance on appeal, notwithstanding hurtful error, pursuant to sections 398 and 658, R. S. 1881, is justified only when it affirmatively appears by the record that the merits of the cause have been fairly tried and determined; but if this be uncertain there will be a reversal.

From the Henry Circuit Court.

H. C. Fox and M. E. Forkner, for appellant.

C. H. Burchenal and J. Yaryan, for appellees.

BICKNELL, C. C.—This action was brought by the appellant against the appellees, upon three promissory notes executed by the defendants to the plaintiff, and a mortgage securing the same. Issues were joined upon complaint, answer and reply. There is no question upon the pleadings. There

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was a trial by the court, who, at the request of the plaintiff, under section 341 of the code of 1852, stated the facts and the conclusions of law separately, as follows:

"I find that in 1862 there was a judgment against these defendants in the Wayne Circuit Court, in favor of David Sonwell; that in 1862 or 1863 the plaintiff, Kepler, at the request of defendants, paid off this judgment, the balance then being \$2,400; that the judgment bore six per cent. interest; that for seven years the defendants paid said Kepler \$230 each year, in all, \$1,610, and for the next two years \$400 each year, in all, \$800, making a total for nine years of \$2,410 in excess of the six per cent. interest the judgment was bearing, as and for the use of said money, and in consideration that Kepler would and did give them time on said debt; that in January, 1872, they had a settlement, in which said judgment was counted up at six per cent. interest, and no account was taken or credit allowed for the extra interest paid as above found; that the notes in suit, to wit, three notes for \$720 each, payable to the order of John Kepler, dated January 1st, 1872, and payable respectively in three, four and five years after date, with interest at ten per cent. and costs and attorneys' fees, signed by the defendants, and each credited with interest paid to January 1st, 1877, and another note for \$1,440, were given for the balance due on said judgment; that the \$1,440 note has since been paid off, and the interest on the notes in suit to January 1st, 1877, and that the suit was begun since the law of 1879 was in force; from all of which I draw the following conclusions of law:

"1. That the plaintiff is entitled to six per cent. interest on said judgment and no more.

"2. That the \$2,410 paid as extra interest over and above the six per cent. was usurious, and that the defendants are entitled to recoup the same.

"3. That there is, therefore, nothing due the plaintiff upon the notes in suit, and the defendants are entitled to a judgment in their favor for costs."

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The plaintiff objected and excepted to said special finding; his objection was overruled, and he excepted to said overruling. He excepted to the conclusions of law. He moved for a new trial, alleging that the finding was not sustained by the evidence and was contrary to law. This motion was overruled; judgment was rendered on the finding, and the plaintiff appealed.

He has assigned eight specifications of error, but as his counsel, in their brief, discuss the fifth, sixth and seventh only, the others are regarded as waived. The fifth is that the court erred in overruling the plaintiff's exception to the special finding. The sixth is that the court erred in not finding specially on all the issues of fact in said cause.

These specifications present no question, because the exception mentioned in sections 341 and 342, *supra*, is not an exception to the finding of the court, but to the conclusions of law. *Cruzan v. Smith*, 41 Ind. 288. And it is not the office of a special finding to find expressly upon the issues, but to find the facts proven within the issues. *Ex parte Walls*, 73 Ind. 95, 110. If the court ought to have found facts which are not found, the remedy is by a motion for a new trial, on the ground that the finding is contrary to the evidence. *Ex parte Walls*, 73 Ind. 95, 110, 111.

The seventh specification is that the court erred in its conclusions of law. The court assumed that because the laws of 1879 were in force at the commencement of the suit, therefore the suit was controlled as to interest by the act of March 10th, 1879 (Acts 1879, p. 43). Ordinarily, it is true that the law in force when the suit is brought controls the remedy, as to interest. *Perrin v. Lyman's Adm'r*, 32 Ind. 16; *Bowen v. Phillips*, 55 Ind. 226. But the eighth section of said act of 1879 provides that "nothing herein contained shall be construed as affecting existing contracts," etc. This case, therefore, was not governed by the law of 1879, but as to all payments of interest made prior to the taking effect of the act of March 9th, 1867 (1 R.S. 1876, p. 599), was governed by the act of March

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7th, 1861 (1 R. S. 1876, p. 600), the fifth section of which, as amended by the act of December 19th, 1865 (3 Ind. Stat., p. 316), provides that "in all cases in which money or any other thing of value shall have been voluntarily paid as interest for the loan, use, or for usance of money, the same shall not be recovered back either directly or by way of set-off, or counter-claim or payment."

Hence, the sum of \$2,410 mentioned in the finding having been voluntarily paid as interest, the defendants were not entitled to recover it all back. *Sims v. Squires*, 80 Ind. 42; *Reynolds v. Roudabush*, 59 Ind. 483. The court, therefore, erred in its first and second conclusions of law.

The third conclusion of law is, "There is, therefore, nothing due the plaintiff upon the notes in suit, and the defendants are entitled to a judgment for costs."

The third conclusion being stated as a consequence of the other two, and they being wrong, it would seem that the third must also be wrong.

The appellees, in their brief, concede that the first and second conclusions of law are wrong, and they do not claim that the third is right, but they insist that, upon the facts as proved, the judgment was right, and, therefore, ought not to be set aside for intermediate errors. They cite section 398, R. S. 1881, to the effect that no judgment shall be reversed for any error which does not affect substantial rights, and section 658, of the same statutes, to the effect that a judgment shall not be reversed where it shall appear that the merits of the cause have been fairly tried and determined in the court below. They cite also several cases in which these statutes have been enforced, and they undertake to show that the matters found by the court fully warrant the judgment, but in so doing they assume certain facts which are not found by the court.

In *Sanders v. Scott*, 68 Ind. 130, where both the conclusion of law and the special finding showed that the judgment was for the proper amount, and yet, in the conclusion of law, there

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was "a little confusion in the figures," it was held that no substantial error was committed.

In *Suman v. Springate*, 67 Ind. 115, this court said: "It is not stated in the special finding, that Julia V. McCullough, at," etc., "was a married woman; but there is a strong inference, * that she was such." The court further said: "If we may assume, as a fact found, that at," etc., she "was a married woman, the case is entirely free from difficulty." But the court declined so to assume, and decided the case as if she were a *feme sole*. There the special finding and judgment were for the defendant. There was some uncertainty in the finding upon another point; as to this the court said: "For the purposes of the decision we will put the most favorable construction for the plaintiff upon the finding, and regard it as found that Julia V. agreed to convey it back." This case decides that where an inference may be properly made from the facts stated in a special finding, that construction will be adopted which is most favorable for the party against whom the finding was made. In the case at bar there is no finding of the date of the advancement of the \$2,400 by the plaintiff; the appellees assume that the date was January 1st, 1863.

Again, the special finding states that "the \$1,440 note has been since paid off," but does not state when it was paid; the appellees assume that it was paid January 1st, 1874; they also assume that at that date the note fell due, but the finding states nothing on that point; it states only this: "And another note for \$1,440 was given for the balance due upon said judgment."

Upon these three assumptions, to wit: 1. That the plaintiff advanced his money on January 1st, 1863; 2. That the note for \$1,440 was due January 1st, 1874; 3. That said note was paid on January 1st, 1874,—the appellees, in their brief, state an account by which they claim that the notes were overpaid by \$128.84, and that, therefore, the judgment for defendants was right, notwithstanding the errors in the conclusions of law. But these assumptions are not inferences properly made from the special finding. There is nothing in

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the finding which shows when the \$2,400 was advanced by the plaintiffs, nor when the \$1,440 note fell due, nor when it was paid.

The cases cited by the appellees are not in point. The finding does not show that the judgment was right, nor do any proper inferences to be made therefrom show that the judgment was right.

The appellant claims \$149.52 as due; the appellees claim an overpayment of \$128.84, and it is impossible to determine by the finding which is right. The conclusions of law were clearly wrong, and for this error the judgment should be reversed. Ordinarily, in such a case, the cause is remanded to the court below, with instructions to state proper conclusions of law; but here there was a motion for a new trial because the finding was not sustained by the evidence and was contrary to law. We think this motion ought to have been sustained.

The judgment ought to be reversed, and a new trial should be awarded.

PER CURIAM.—It is therefore ordered, on the foregoing opinion, that the judgment of the court below be and it is hereby in all things reversed, at the costs of the appellees, and this cause is remanded for a new trial.

ON PETITION FOR A REHEARING.

BICKNELL, C. C.—The court, as stated in the principal opinion, made a special finding of the facts, and stated the following conclusions of law:

1st. The plaintiff is entitled to six per cent. interest, and no more.

2d. The \$2,410 paid as extra interest over and above the six per cent. was usurious, and the defendants are entitled to recover the same.

3d. There is, therefore, nothing due the plaintiff on the notes in suit, and the defendants are entitled to judgment in their favor for costs.

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The appellees admit that the first and second of these conclusions of law were wrong, and they were wrong undoubtedly. *Sims v. Squires*, 80 Ind. 42; *Reynolds v. Roudabush*, 59 Ind. 483. Therefore, the third conclusion of law can not be the legal consequence of the other two, as it is stated to be.

In this petition the appellees claim that, notwithstanding the wrong conclusions of law, the judgment was right upon the special findings, and therefore ought not to be set aside; but the special findings were defective, as shown in the principal opinion. In such a case, when the conclusions of law are clearly wrong, this court will not always send the case back with instructions to state proper conclusions, but, when substantial justice requires it, will award a new trial. The petition for a rehearing should be overruled.

PER CURIAM.—The petition is overruled.

No. 10,459.

BURTT v. PYLE.

NOTARY PUBLIC.—*Contempt.*—*Depositions.*—*False Imprisonment.*—A notary public has no power, either at common law or by statute, when taking a deposition, to punish the witness as for contempt for contumacious refusal to answer proper questions; and where the witness was committed to jail for such refusal, an action for false imprisonment will lie against the notary.

From the Floyd Circuit Court.

J. K. Marsh, H. A. Burtt and A. Dowling, for appellant.
P. H. Jewett, C. L. Jewett and H. E. Jewett, for appellee.

HAMMOND, J.—Action by the appellee against the appellant for damages for false imprisonment.

The appellant, in the second paragraph of his answer, justified the imprisonment on the ground that he was a notary public, lawfully and properly engaged in taking the appellee's deposition, to be used as evidence in a case pending in the

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Clark Circuit Court; that the appellee, in obedience to a summons, appeared before the appellant as a witness in said case and was duly sworn, but refused to testify or answer proper questions; that for such refusal the appellant, as such notary public, adjudged the appellee guilty of contempt, and as punishment for his contempt, and for the purpose of compelling him to testify and answer such questions, committed him to the county jail for the period of three hours.

The answer is sufficient, provided the law authorized notaries public to punish contumacious witnesses, whose depositions were being taken before them, by imprisonment for refusing to testify or answer legally propounded questions. The court sustained a demurrer to the above answer. The appellant excepted, and the ruling of the court in sustaining the demurrer is the only error assigned in this court.

The common law did not authorize a notary public to take depositions; such authority is conferred only by statute. With respect to taking depositions, and the manner of taking them, the powers of notaries are prescribed and limited by legislative enactment. The statute of this State authorizes them to take depositions and to compel the attendance of witnesses; but they have no power to punish for contempt the refusal of a witness to respond to an interrogatory. By the present statute, R. S. 1881, section 426, the officer taking a deposition may invoke the assistance of the circuit or superior court of the county, or the judge thereof, to compel the attendance or coerce the evidence of an unwilling witness. This statute was not in force at the time of the grievance set out in the appellee's complaint; but the fact that the Legislature at that time had provided no remedy to compel a witness to testify by deposition, did not excuse the appellant for seeking a remedy outside of the statute.

The appellant calls our attention to *In Re Abeles*, 12 Kan. 451, *Ex parte McKee*, 18 Mo. 599, and *Ex parte Mallinckrodt*, 20 Mo. 493; but these cases are not authority in this State. The statutes of those States expressly authorize offi-

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cers taking depositions, including notaries public, to imprison a witness, as for contempt, for refusal to answer a proper question in the taking of his deposition.

Our conclusion is, that as the statutes of this State do not empower a notary public to punish for contempt, by fine or imprisonment, for disobedience of his authority in taking depositions, he has no legal right to inflict either of these penalties for such disobedience.

The second paragraph of the appellant's answer was insufficient, and the demurrer to it was properly sustained.

The judgment is affirmed, at the appellant's costs.

89	400
127	362
89	400
165	258

No. 10,013.

SHEARER ET AL. v. EVANS.

CONVERSION.—*Jurisdiction.—Residence.—Principal and Agent.—Action, Where Commenced.*—Where two are sued for the conversion of goods who reside in different counties, the one having acted as the agent of the other in receiving and converting the goods, suit may be brought against both in the county where the agent resides. R. S. 1881, sec. 312.

SAME.—*Master and Servant.*—The mere fact that a hired servant has possession and control of his master's property gives him no power to sell it, or vest title in the purchaser.

SAME.—*Stolen Goods.*—One who innocently buys stolen goods of a thief takes no title, and if he mix the goods with his own so that they can not be identified, and then sell them, he is liable for conversion.

SAME.—*Agent.*—That one of the defendants was the agent of the other in doing the acts which constituted a conversion of goods, for which they are jointly sued, affords no protection to either.

From the Huntington Circuit Court.

W. H. Trammel and T. L. Lucas, for appellants.

A. Moore, J. C. Branyan, C. W. Watkins, M. L. Spencer and W. A. Branyan, for appellee.

BLACK, C.—The appellee sued the appellants, David L. Shearer and George Shearer, alleging that on, etc., the defendants, without right, and without the knowledge or consent of

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the plaintiff, came into possession of 240 bushels of wheat, the property of the plaintiff, and, without the knowledge or consent of the plaintiff, so intermingled said wheat with other wheat in the possession of the defendants that the plaintiff had never been able to identify his said wheat and separate it in bulk from said other wheat, and that the plaintiff had never lost his title to his said property, or any part thereof. The value of the wheat was stated, and it was alleged that the plaintiff, before the commencement of this suit, had demanded the same from the defendants, who had failed and refused to pay the same or any part thereof.

The defendant David L. Shearer, appearing specially, for himself alone, answered that before the commencement of the action he had been, and that he still was, a resident of Miami county, Indiana; that he and his co-defendant "have no business connection as partners or otherwise, except the said George has the control and management of this defendant's grain elevator, in said county of Huntington, but has no interest in the same, save and except that of an employee." Prayer, "that said cause be estopped, and that he have judgment for costs." This answer was verified. The court sustained a demurrer of the plaintiff to it, and overruled separate demurrs of the defendants to the complaint.

By the first two specifications of the assignment of errors and the argument of counsel thereon, it is sought to present the questions, whether the complaint stated facts sufficient to constitute a cause of action, and whether this answer showed that the court below had not jurisdiction of the person of the defendant David L. Shearer.

The complaint stated a cause of action for the conversion of the plaintiff's wheat; and the fact that one of those who converted it was the employer of the other and resided in another county in this State did not deprive the court of jurisdiction of the former. Sec. 312, R. S. 1881.

The defendants answered separately, each in several para-

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graphs. Demurrsers of the plaintiff to the third paragraph of each answer were sustained; and these rulings are assigned as errors.

By the third paragraph of the answer of David L. Shearer, it was admitted that he, through his co-defendant, his employee, purchased about the amount of wheat mentioned in the complaint, of Charles Holdridge, who, it was alleged, was at the time the hired hand and employee of the plaintiff, and who, as such, had possession and control of plaintiff's property; for which wheat this defendant at the time paid said Holdridge the full market price; that the defendants had no knowledge at the time of any wrong in said transaction, or that the wheat belonged to the plaintiff; and that before either of the defendants knew of any wrong therein, or that the wheat belonged to the plaintiff, or the plaintiff had made any demand of either defendant, said wheat had been in a regular way sold and disposed of, and was no longer in the possession or control of this defendant.

The third paragraph of the answer of George Shearer was the same, in substance, as that of his co-defendant.

There was no error in sustaining demurrsers to these paragraphs. They did not deny, but impliedly admitted, that the wheat was the property of the plaintiff. They did not allege for what purpose or under what circumstances Holdridge had possession or control of the plaintiff's property, and did not show that Holdridge was capable of transferring title thereto, or that the possession acquired by the defendants was rightful.

The plaintiff replied, and the issues were tried by the court, and, upon request of the defendants, a special finding was rendered. The court found that in November, 1880, one Charles Holdridge, then a hired hand of the plaintiff, and having charge of his farm and property during his temporary absence, without any right or authority, wrongfully and unlawfully took 239 bushels and 25 pounds of wheat, owned by the plaintiff and in his possession, and sold and delivered it to the defendants, at the warehouse of the defendant David

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L. Shearer, in Huntington, Indiana, the defendant George Shearer being the agent of his co-defendant for the conducting of said warehouse and its business, the defendant David being then and since that time a resident of Peru, Indiana, conducting said business by and through his son and agent, his co-defendant; that said wheat was purchased by said agent and by him was received into the main bin of the warehouse, with other grain of like kind, and with it was so mixed that it could not thereafter be separated or distinguished from that with which it was mixed; that afterwards said agent shipped said grain to an Eastern market and received pay therefor in the name of his principal; that afterward, and before the commencement of this suit, the defendant David, when informed of the above facts, ratified the same and accepted said acts of his co-defendant; that thereafter, before the commencement of this suit, the plaintiff made demand upon each of the defendants to settle and pay for said grain, which the defendants failed and refused to do; and that when said wheat was so sold by said Holdridge, when it was so shipped by said agent, and at the time of said demand, said wheat was worth \$1 per bushel.

Upon these facts the court stated, as a conclusion of law, that the defendants were indebted to the plaintiff at the commencement of this suit, and were still indebted to him, for the value of said wheat in the sum of \$239.41.

The defendants excepted to the conclusion, and have assigned it as error. The overruling of a motion for a new trial, which questioned the sufficiency of the evidence, is also assigned as error.

The evidence fully sustained the finding, and the conclusion was not erroneous. The taking of the wheat by Holdridge was larceny, and he could not confer a good title. The possession of Holdridge being tortious, those who bought from him did so at their peril. The property still belonged to the plaintiff, and the taking of the possession thereof by the defendants, with the mixing of the wheat with other wheat

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and the sale thereof, and their denial of the plaintiff's right, constituted a conversion of the wheat, and there could be no protection to either of the defendants in the fact that one was the agent of the other who adopted the purchase, or the fact that the defendants received the grain and sold it in the regular course of trade and in good faith. *Robinson v. Skipworth*, 23 Ind. 311; *Breckenridge v. McAfee*, 54 Ind. 141; Cooley Torts, 451; 1 Addison Torts (Dudley & Baylies' ed.) 397, 418, 446.

The judgment should be affirmed.

PER CURIAM.—It is ordered, upon the foregoing opinion, that the judgment be affirmed, at the costs of the appellants.

39	404
128	358
89	404
142	473

No. 9643.

SCOTTON v. MANN ET UX.

HUSBAND AND WIFE.—*Contract.—Parties.*—Where a husband contracted in his own name for the benefit of his wife, both might join as plaintiffs under the code of 1852, sections 4 and 8, to enforce it.

SAME.—*Verdict.*—In a joint suit by husband and wife on a contract made by the husband, containing covenants, some of which are for the separate benefit of each, the jury may find separate damages in favor of each.

JUDGMENT.—*Supreme Court.*—If a judgment do not follow the verdict, the error can be saved for correction in the Supreme Court by a specific motion for the proper modification only, but not by a motion embracing more.

From the Grant Circuit Court.

T. G. Smith, I. Van Devanter, J. W. Lacey and W. Van Devanter, for appellant.

B. M. Cobb, J. C. Branyan, C. W. Watkins and M. L. Spencer, for appellees.

BICKNELL, C. C.—John J. Scotton and George W. Mann entered into a written contract as follows:

“ This is to certify that in consideration of a quitclaim deed,

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made on the 17th day of January, 1876, by George W. Mann and Catharine, his wife, to John J. Scotton, for the following real estate in Huntington county, Indiana." Here two tracts of land are particularly described, one of them containing 100 acres and the other 32 acres, and the contract proceeds thus: "In part of the consideration of said quitclaim deed as aforesaid, the undersigned John J. Scotton hereby agrees to give the privilege to the said Mann to sell the above described real estate, or any part thereof, at any time within one year from the date hereof, and also the undersigned retains the same privilege, and that when the sum of \$3,200, with the interest thereon at 10 per cent. from January 17th, 1876, shall be paid, the said Mann shall have the remainder of the sum for which he or myself shall sell said above described real estate, or any part thereof. And in case the said Mann or myself shall sell any part of said real estate, for a sum sufficient to pay said sum of money, then the undersigned John J. Scotton agrees, for himself, heirs and assigns, to deed the remainder to Catharine Mann; also a debt due to the undersigned from George W. Mann is to be paid out of the sum for which said land shall sell, or any part thereof. And as a part of the above covenants, and upon the sale of said real estate, or any part thereof, the said Mann agrees to give quiet and peaceable possession of the same to the purchaser. In witness we have hereunto set our hands and seals this 18th day of January, 1876.

JOHN J. SCOTTON.

"GEORGE W. MANN."

In April, 1880, Mann and wife brought this suit against Scotton upon the foregoing contract, alleging in their amended complaint that on the 1st day of February, 1876, Scotton sold said 100 acres to Arthur Lakey for \$4,000, more than enough to pay all the indebtedness mentioned in said contract; that thereby \$800, the surplus after paying said indebtedness, became due from Scotton to the plaintiff George W. Mann; that after said sale said Scotton conveyed to his son Oliver said 32 acres, which was worth \$2,000, whereby the plaintiffs are

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damaged \$3,000, for which they demand judgment and all proper relief.

A demurrer to the amended complaint, for want of facts sufficient, etc., was overruled, and this is one of the errors assigned by the appellant.

The objection made to the complaint is that it shows no joint cause of action; that under the contract the right to the surplus, after paying the indebtedness, belonged to George W. Mann, and the right to the 32 acres belonged to Catharine Mann; that either of them might sue separately, but both can not sue jointly.

In general, where two sue, the complaint must show a joint cause of action; if it fails to do so there are too many plaintiffs, and that defect is good cause of demurrer for want of facts sufficient to constitute a cause of action. *Neal v. State, ex rel.*, 49 Ind. 51; Busk. Prac. 167. But the complaint in this case did state a cause of action upon which the husband and wife had a right to sue jointly, namely, in reference to the 32 acres of land. The husband had a right to sue on the privity of contract, the contract being made with him for the benefit of his wife. 2 R. S. 1876, p. 34, section 4. In such a case the husband always had a right to join his wife as plaintiff, she having the meritorious cause of action, and under the code of 1852, which governs this case, the husband must be joined where his wife is a party, except that in certain cases she may sue alone. 2 R. S. 1876, p. 36, section 8. The demurrer to the amended complaint was, therefore, rightly overruled. *Board, etc., v. Slatter*, 52 Ind. 171.

The defendant filed an answer in two paragraphs:

1. The general denial.
2. Admitting the contract and the sale of the 100 acres for \$3,700, and alleging that he had made a conditional sale of the 32 acres to Oliver Scotton for \$900, which sale had been rescinded; that the individual debt due from George Mann, mentioned in the contract sued on, was about \$800, which, together with 2½ per cent. commission on the sale of the 100

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acres, amounting to \$92.50, and cash paid out for executing conveyance papers and other expenses, equalled the value of the 32 acres, and that the proceeds of the 100 acres did not reimburse him for the \$3,200, mentioned in the contract, and the interest thereon.

The defendant filed also a cross complaint, averring that the plaintiffs held said lands subject to a mortgage, upon the foreclosure of which they were bought by Elizabeth Nix, and by her conveyed to the defendant for \$3,200, which he paid; that this purchase by defendant was made at the request of plaintiffs, and for the purpose of giving them time to pay off said indebtedness, and that, as a part of the arrangement, the quitclaim deed and the contract mentioned in the complaint were made, and that the excess of the proceeds of the sales contemplated in the contract over the indebtedness and interest mentioned in the contract, after deducting therefrom a reasonable compensation for the time and services of defendant, and his cash outlays, was to be paid to said plaintiffs. The cross complaint then repeats the allegations of the second paragraph of the answer as to the sales of the land, and states the account as follows:

Plaintiffs are indebted to defendant for amount paid

to Mrs. Nix	\$3,200.00
Interest on same one year at ten per cent.	320.00
Individual indebtedness	800.00
	4,320.00
For commission and services	92.50
	4,412.50

Total \$4,412.50
They are entitled to credit for amount received on
sale of 100 acres to Lakey 3,700.00

Leaving yet due defendant \$ 712.50

The prayer of the cross complaint is that defendant may have judgment for \$712.50, and that the deed to him for the thirty-two acres, together with the defeasance contained in

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the contract, be declared a mortgage; that said mortgage be foreclosed, etc.

At this stage of the proceedings the defendant made an affidavit that the plaintiffs had an undue influence over the citizens of Huntington county, where the suit was pending, and took a change of venue to Grant county.

The plaintiffs replied jointly in denial of the second paragraph of the answer, and they answered jointly in denial of the cross complaint. The issues were tried by a jury, who returned a verdict and an answer to an interrogatory submitted on behalf of the plaintiffs, as follows:

"We, the jury, find for the plaintiffs, and that there is due George Mann the sum of \$300, and we find there is due Catharine Mann the sum of \$1,400, and we find that the title of the defendant be quieted to the land, the thirty-two acres in complaint described."

"Question 1. Had John J. Scotton conveyed away by deed all the land described in the contract filed with the complaint before the commencement of this suit? Ans. Yes."

The jury also returned answers to interrogatories submitted on behalf of defendants as follows:

"Question 1. Was any demand made of the defendant before the commencement of this suit, and after the land was sold and paid for to an amount sufficient to pay the debts due, under the contract, to the defendant? Ans. Yes.

"Question 2. What amount was due upon the debts mentioned in the contract sued on, at the time the land sold under the contract was paid for? Ans. \$3,200.

"Question 3. What amount was received for the land? Ans. \$3,700.

"Question 4. What was the value, at the time the land sold was paid for, of the land mentioned in the contract remaining unsold? Ans. \$1,076.92; interest, \$323.09."

The defendant filed a motion for a *venire de novo*, alleging eleven reasons therefor; this motion was overruled. The defendant filed a motion for judgment in his favor upon the ver-

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dict and special findings, because, 1st. All the issues in the cause are found in favor of the defendant; 2d. The only matters found against the defendant are outside of the issues. This motion was overruled.

The defendant then moved for a new trial, and this motion was overruled; and a motion by defendant in arrest of judgment was also overruled. The court then rendered separate judgments, one in favor of George W. Mann for \$300 and costs, and the other in favor of Catharine Mann for \$1,400 and costs. The defendant at the time objected to the entering of each of these judgments, that it was not within the issues, nor authorized by the issues, but the court overruled the objections, and defendant excepted. The defendant appealed. He assigns as errors:

1. Overruling the demurrer to the amended complaint.
2. Overruling the motion for a *venire de novo*.
3. Overruling the motion for judgment upon the verdict and special findings.
4. Overruling the motion for a new trial.
5. Overruling the motion in arrest of judgment.
6. Rendering the separate judgment in favor of George W. Mann over the appellant's objection.
7. Rendering the separate judgment in favor of Catharine Mann over the appellants' objection.

The first of these alleged errors has already been considered. As to the second error assigned, the question as to a *venire de novo* is thus presented by the appellants in their brief: "The point presented by the motion is that the verdict is not responsive, in that it finds upon separate causes of action in favor of the appellees separately, but finds nothing upon any joint cause of action; the appellees may not in their complaint state a cause of action in favor of themselves jointly, and upon the trial prove and recover upon separate causes of action in their favor separately."

Where the facts stated in a complaint by two or more do not show a joint cause of action a demurrer will be sustained.

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Debolt v. Carter, 31 Ind. 355: Under the contract sued on in this case, we think the jury had a right to find separate damages for George Mann and Catharine Mann. See the code of 1852, sec. 368; *Fitzgerald v. Genter*, 26 Ind. 238; *Hubbell v. Woolf*, 15 Ind. 204; *Draper v. Vanhorn*, 12 Ind. 352; *Berkshire v. Shultz*, 25 Ind. 523; *Douglass v. Howland*, 11 Ind. 554. The motion for a *venire de novo* was rightly overruled.

As to the third error assigned, it is true that, the jury having returned a verdict that the defendant should be quieted in his title "to the land, the thirty-two acres in the complaint described," the judgment should have followed the verdict in this respect, which, however, it fails to do. But the motion made by the defendant was too broad; instead of demanding that the judgment be modified by adding thereto a clause quieting the defendant's title, etc., the defendant moved for judgment in his favor, that the plaintiffs take nothing by their complaint, and that the defendant's title be quieted, and that he recover his costs. There was no error in overruling this motion. It follows from what has already been said that there was no error in overruling the motion in arrest of judgment, or rendering separate judgments in favor of the plaintiffs.

The only remaining error assigned is overruling the motion for a new trial. The reasons alleged for a new trial are the following:

- 1st. That the court erred in admitting in evidence the deed from the sheriff of Huntington county to Elizabeth Nix for the real estate in the complaint described.
 2. That the verdict is not sustained by sufficient evidence.
 3. That the special findings of the jury in answer to interrogatories are not sustained by sufficient evidence.
 4. That the verdict of the jury is contrary to the evidence.
 5. That the special findings of the jury in answer to interrogatories are contrary to the evidence.
 6. That the verdict of the jury is contrary to law.
 7. That the damages assessed by the jury are excessive.
- The first of these reasons for a new trial is not discussed

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by the appellant in his brief, and is, therefore, regarded as waived.

As to the second reason alleged for a new trial, to wit, that the verdict was not sustained by sufficient evidence. The deed from Scotton and wife to Lakey for the 100 acres of land was a warranty deed for the sum of \$3,700, dated February 1st, 1876. The deed from Scotton and wife to Oliver Scotton for the 32 acres, was a warranty deed for \$900, dated February 15th, 1876.

Arthur Lakey testified that he bought the 100 acre tract from John Scotton for \$3,700. He further testified as follows: John Scotton told me at the time that the amount for which he was selling the land to me would pay all the debts that Mann owed him and about \$300 more; the 32 acre tract is worth \$40 per acre; Scotton came to me to get me to buy the land; I told him I would not buy without the consent of Mr. Mann; Mann and I afterwards went to Scotton and Scotton told us that he had been figuring on the indebtedness of Mann to him, and that my payments would pay off the whole indebtedness and about \$300 over; Mann asked Scotton about the individual indebtedness of himself to Scotton over and above the \$3,200 paid by Scotton for the land, and Scotton told him that my payments would pay everything, including the individual indebtedness; I bought the land on payments, giving my notes for \$1,200 due in one year, \$1,000 in two years, \$1,000 in three years, and \$500 in four years; the first payment of \$1,200 drew interest at ten per cent., the other payments at 6 per cent.

Catharine Mann, one of the plaintiffs, testified: Scotton was married to my sister; he came to our house one morning a few days after I executed a deed to him for the land; he told me I would not be sold out; he said there would be \$1,800 or \$1,900 coming to me, and that my son had told him a certain farm could be bought for \$1,600, and he would buy it for me if I said so; I never consented to any sale of the 32 acres by Scotton; he has never paid me anything; the first

Scotton *v.* Mann *et ux.*

conversation referred to in my testimony was just before Mr. Scotton sold the land to Mr. Lakey, and after I had signed the deed to Scotton.

George W. Mann, one of the plaintiffs, testified: A week or two after the sale of the 100 acres to Lakey I asked Scotton to deed back the 32 acre tract; when we talked about selling the 100 acres, I asked Scotton if the sale would produce enough to pay off all claims he had on me; he said there would be enough and \$300 over; he said the individual debt I owed him was \$273; I think that is what the debt was; the 32 acre tract was worth \$40 per acre.

Philip White testified: I told Scotton that it was rumored among the neighbors that he had cheated Mann out of his land; he replied he had an agreement in writing with Mann and proposed to live up to it, and that the neighbors need not make themselves so damned busy; the 32 acre tract was worth \$37.50 per acre.

John Lakey testified: The value of the 32 acres in 1876 was \$40 per acre.

James Branyan testified that the Lakey notes were paid, and that after the payment he, for the plaintiffs, demanded of Scotton a conveyance of the 32 acres of land, and asked for the money due on the contract at the same time.

The contract was fully proved as stated in the complaint.

The testimony, of which the foregoing is a brief summary, in connection with the other evidence in the cause, tended to support the verdict of the jury. There was some evidence tending to support the defence, but in such cases the court will not undertake to decide upon the preponderance of the testimony.

Where there is testimony tending to support the verdict, this court can not disturb the verdict, even though the preponderance of the evidence may seem to be against it. *Davis v. Nicholson*, 81 Ind. 183. Therefore, the second, third, fourth, fifth and sixth reasons for a new trial were not sufficient.

The seventh reason for a new trial, to wit, that the damages

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were excessive, can not be sustained. The damages do not appear to be excessive. There was no error in overruling the motion for a new trial, and the judgment should be affirmed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment of the court below be and it is hereby in all things affirmed, at the costs of the appellant.

Opinion filed at the November term, 1882.

Petition for a rehearing overruled at the May term, 1883.



No. 10,076.

SCOTT ET AL. v. BRACKETT ET AL.

80	413
120	525
80	413
135	12

DRAINAGE.—*Commissioner of.*—*Petition for Drain.*—*Notice.*—*Statute Construed.*

—The circuit court has no power, under the provisions of the act of April 8th, 1881, R. S. 1881, sections 4273, 4284, to refer a petition for the location of a ditch to a commissioner of drainage until an affidavit has been filed showing that notice has been given as required by the 3d section of said act, section 4275, R. S. 1881.

SAME.—*Defective Affidavit.*—A defective affidavit will not authorize the reference, nor will a sufficient one subsequently filed cure the defects, as the requirement that notice must be shown by affidavit filed is a condition precedent to the power to make the reference.

SAME.—*Service of Process.*—Where an insufficient affidavit is filed, the service of process must be deemed defective, and this is good cause for reversal upon appeal.

SAME.—The 8th section of said act, section 4280, R. S. 1881, which provides that the judgment shall be deemed conclusive, that all prior proceedings were regular and according to law, can not apply to such prior proceedings as confer jurisdiction, and, hence, can not cure a defect in the service of process.

SAME.—*Presumption.*—Where proof of the service of process is in the record, its sufficiency is in no manner aided by any presumption.

SAME.—*Constitutional Law.*—It does not follow because certain provisions of said act may be invalid, that the entire act is unconstitutional, and as appellant's personal property was not sold, and he was not denied a trial by jury, the constitutionality of these particular provisions does not arise and can not be considered.

SAME.—The act in question is not unconstitutional, for the reason that no provision is made for personal service of notice upon the owner of the

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land affected by the location of such ditch, nor for the further reason that the commissioners of drainage discharge their duties under the control and subject to the order of the court.

From the Fulton Circuit Court.

W. Miles and M. R. Smith, for appellants.

M. L. Essick and G. W. Holeman, for appellees.

BEST, C.—On the 2d day of August, 1881, Lyman M. Brackett, Alfred H. Robbins and Anson H. Merrick filed their petition in the clerk's office of the Fulton Circuit Court for the construction of a ditch in Rochester township, in said county. On the 7th day of September following, an affidavit that notices had been posted was presented to the court and an order was made referring the matter to the commissioners of drainage of said county, directing them to examine the proposed work and make their report on the 21st day of said month. On the 21st of said month said commissioners filed their report, in which the estimated cost of such proposed work was fixed at \$3,478.60, and the benefits assessed to various parcels of land therein described aggregated \$4,494.15, \$2,269.80 of which was assessed to lands belonging to the appellant Mary R. Scott. No remonstrance having been filed to the report, the same was, on the 1st day of October thereafter, confirmed, and Isaac Busenburg, one of said commissioners, was directed to construct the work. Afterwards said commissioner assessed eighty-five per cent. of the benefits named to each tract of land mentioned in the report, and on the 8th day of October thereafter gave notice through a newspaper that such assessment was payable in five equal installments, the first on the 9th day of November, 1881, and the balance in one, two, three and four months from that time, and also caused a notice to be recorded in the recorder's office of said county, that the work had been established, and that the assessment of benefits had been confirmed by the court. On the 13th day of December following, the appellants filed their petition or motion to set aside said judgment establish-

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ing said proposed work and approving said assessments, and asked to be permitted to remonstrate against the report of said commissioners. The grounds of this application were these:

1st. That they did not have any actual notice of the pendency of said proceedings until after the rendition of the judgment.

2d. That the court erred in referring the matter to the commissioners of drainage until an affidavit had been filed, that notices of an intention to present the petition had been posted for twenty days in three public places in the township where the lands described in the petition are situated.

3d. That the act of April 8th, 1881, under which the proceedings were had, is unconstitutional.

4th. That Mary R. Scott, the appellant, owns 1,040 acres of land, which is assessed at \$2.20 per acre, in all, \$2,269.80, and that the balance of the land, $2,121\frac{4}{100}$ acres of land, is assessed at \$1.03 per acre; in all, \$2,189.35; and that her assessment is unjust, inequitable and oppressive.

5th. That Lyman M. Brackett is the only petitioner who is prosecuting this proceeding, and that his land, forty acres, has only been assessed at forty-four cents per acre, in all, \$17.50.

6th. That said proposed ditch is not sufficient to properly drain the lands affected, and that said lands to be benefited by such proposed ditch have been omitted from such assessment.

Pending this motion, the appellees obtained leave and filed an amended affidavit, stating that the notices posted were posted in the township where the real estate mentioned in the petition is situated, after which the court overruled the application of appellants to set aside the judgment. From this judgment the appellants appeal.

The first question presented is whether the court erred in referring said petition to the commissioners of drainage before the proper affidavit was made as required by statute.

These proceedings were had in pursuance of the act of April 8th, 1881, and to the provisions of that act we must

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look to determine the regularity and legality of these proceedings. The 1st section provides that the circuit court of each county shall appoint two persons commissioners of drainage, and that the county surveyor, by virtue of his office, shall be the third. The 2d section provides that whenever the owner of lands, which will be benefited by drainage, and which can not be done without affecting the land of others, desires such drainage, he may apply by petition to the circuit court of the county where said land is situated, stating therein that the public health will be improved, or that one or more highways of the county, or a street or streets of a town or city will be benefited, or that the proposed work will be of public utility, giving the method by which the work can be done in the cheapest and best manner, and stating that the costs, damages and expenses will not exceed the benefits which will result to the owners of land likely to be benefited thereby.

The 3d provides that "When it shall be made to appear by affidavit that notice of the intention to present such a petition has been posted for twenty days in three public places in each township where the lands described in the petition are situated, and near the line of the proposed work, and one at the door of the court-house of each of the counties in which said lands are situated, the court shall hear the same, and, if the provisions of the last preceding section have not been complied with, shall dismiss the petition; otherwise, it shall make an order referring the matter to the commissioners of drainage of the county, and fix therein a time and place for the meeting of said commissioners, and a time when they shall report." The 3d further provides that if they find in favor of such proposed work, they shall locate the same, assess the benefits or injury to each separate tract of land, and estimate the cost of the ditch.

The 4th section provides that upon making the report to the court, three days shall be allowed to any owner of lands affected by the work proposed to remonstrate against the report, for any of the following reasons:

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"First. That the petition is not according to law.

"Second. That the report of the commissioners is not according to law.

"Third. By any person or persons whose lands are assessed for benefits, that the damages assessed to any other specified tract are exorbitant.

"Fourth. By any person or persons whose lands are assessed for benefits, that his, her, or their specified lands are assessed too much as compared with other lands assessed as benefited.

"Fifth. By a person to whom damages are assessed, that the same are inadequate.

"Sixth. That it is not practicable to accomplish the proposed drainage without an expense exceeding the aggregate benefit.

"Seventh. That the proposed work will neither improve the public health, nor benefit any public highway of the county, nor be of public utility.

"Eighth. That the work decided upon is not sufficient to properly drain the lands to be affected."

The 4th section further provides that "If there be no remonstrance, * * the court shall also make an order declaring the proposed work established and approving the assessment, and shall direct some one of the commissioners to construct and make the proposed work."

The 5th provides that the commissioner shall from time to time assess upon the lands benefited such sums, not exceeding the benefits assessed, as may be necessary to construct the work; and the 6th provides that he shall prepare a notice, stating therein that the work has been established, the assessment of benefits, as confirmed by the court, cause it to be recorded in the recorder's office of the county, and that the assessment made by such commissioner shall be a lien from the time such notice is recorded.

It will be observed that this statute makes no provision for personal notice. The only notice required is constructive. With such notice, a lien may be fixed upon the land affected

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by the proposed work. Without it, no lien can be acquired, though it is so declared. This is elementary, as every man must have "his day in court." *Campbell v. Dwiggins*, 83 Ind. 474; 2 Works Prac., sec. 995, and authorities cited.

This lien is given by statute, and in order to acquire it the provisions of the statute must be pursued. This is especially true in the observance of those provisions which confer the authority to proceed. These are jurisdictional, and without their observance the court possesses no power to make any order in the proceeding. This is the rule as to process; if none is served the court has no jurisdiction. If notice is given, but not such as is required by the statute, and the court proceeds, its action is at least erroneous, and will be reversed upon appeal, where there has been no waiver of the irregularity. Without notice as required by the statute, the court possesses no power to refer the matter to the commissioners of drainage, nor does it possess any power to make such reference until an affidavit that notice has been given as required by statute has been made. This is the express provision of the statute. In no other way can it appear that notice has been given, and in its absence it does not appear that notice was given. It will not do to say that the affidavit is mere proof that notice was given, and that if it were in fact given the reference is not erroneous, though the affidavit required by statute is not made. The statute requires it, and in order to fix a lien upon lands affected, against the owner's wishes, its provisions must be observed. This is especially true where it is sought to be done by constructive notice. In such case, all the requirements of the statute must be observed in order to authorize the court to proceed and fix the lien. *Cissell v. Pulaski County*, 10 Fed. R. 891; *Steinbaoh v. Leese*, 27 Cal. 295; *Staples v. Fairchild*, 3 N. Y. 41; *Payne v. Young*, 8 N. Y. 158.

In the absence of an affidavit, the court possessed no power to make the reference, as it does not and can not otherwise appear that the notice required by statute has been given. An

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affidavit, however, was filed. This was not such as required by the statute. This the appellees concede, and after the judgment of confirmation they filed another, and now insist that this affidavit supplied the defect. We think otherwise. The requirement of the statute, that an affidavit must be made that notice has been given, is a condition precedent to the right to make the reference, and the reference can not be made until this requirement of the statute has been observed. Cooley Const. Limitations, 292; *Peabody v. Sweet*, 3 Ind. 514. Besides, the additional affidavit was defective, in this, that it did not show that said notices had been posted for twenty days before the reference, and this fact was not shown by either affidavit. If, then, the additional affidavit may be regarded as supplying all other defects, both of them only show defective service, which is, as has often been decided, good cause for reversal upon appeal. Freeman Judgments, sec. 126, and authorities there cited.

In this case there was no waiver, as there was no appearance until after judgment of confirmation, and upon appearance an unsuccessful application was made to set aside the judgment for such irregularity. This motion, in our opinion, should have been sustained, and the reference set aside.

The 8th section of said act provides that the same shall be liberally construed to promote the drainage and reclamation of wet or overflowed lands, and collections of assessments shall not be defeated by reason of any defect in the proceedings occurring prior to the judgment of the court confirming and establishing the assessments of benefits and injuries, but such judgment shall be conclusive that all prior proceedings were regular and according to law.

It is manifest that if this section is applicable to such proceedings as confer jurisdiction, and the judgment is conclusive that all such jurisdictional facts exist, the objection above indicated is cured by this section. The section can not, however, have this effect. This would, in effect, do away with notice. If the judgment is conclusive that all prior proceed-

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ings were regular and according to law, it is conclusive that notice was given, whether any was in fact given or not. The Legislature possesses no power to deprive any person of such rights as are involved in this controversy, without notice. This was decided by this court in *Campbell v. Dwiggins, supra*, and *Tyler v. State, ex rel.*, 83 Ind. 563, and that which it can not do directly by statute, it can not do indirectly by providing that a judgment shall be conclusive evidence of such facts as must exist to confer jurisdiction. Besides, it has several times been decided that the Legislature can not declare what shall be conclusive evidence. *Wantlan v. White*, 19 Ind. 470; *McCready v. Sexton*, 29 Iowa, 352; *Cairo, etc., R. R. Co. v. Parks*, 32 Ark. 131; *Little Rock, etc., R. R. Co. v. Payne*, 33 Ark. 816 (34 Am. R. 55). See Blackwell Tax Titles, 100.

The judgment, therefore, can not conclude the appellants upon this question, and it is unnecessary to determine whether it is *prima facie* evidence of such fact, as the proof of notice is in the record, and in such case it is in no manner aided by any presumption. Freeman Judg., section 125, and authorities cited.

The appellants also insist that the act, by virtue of which these proceedings were had, is unconstitutional, for the following reasons, viz.:

1st. Because any issue of facts raised by a remonstrance for either the third, fourth, fifth, sixth or seventh causes must be tried by the court without a jury;

2d. Because the 5th section authorizes the commissioner of drainage to distrain and sell personal property for the payment of any assessment of benefits precisely as a county treasurer is empowered to do;

3d. Because the notice provided for is unreasonable and only colorable; and,

4th. Because the act imposes upon the circuit court legislative and executive duties.

If the first and second objections made by the appellants

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are well taken, it would not follow that the entire act is unconstitutional; at most, the provisions mentioned would be invalid. No jury was denied appellants, nor was any of their property distrained, and, hence, no question arises as to the validity of these particular provisions of the act, and, hence, we can not consider them.

The third objection is not supported by any authority, and we are of opinion that it is not well taken. Similar notices in many analogous proceedings have been prescribed, and such acts have not heretofore, for such reason, been deemed invalid. The notice required may not bring actual knowledge of the proceedings to those interested, but the act can not, for that reason, be deemed unconstitutional.

The fourth objection is based upon the assumption that all the duties imposed upon the commissioners of drainage are imposed upon the court, and that it discharges them by the aid of these commissioners, who are mere officers of the court. This assumption is not true in point of fact. The duties imposed upon the commissioners do not rest upon the court. The fact that they are appointed by the court, that they must report to the court, and are liable to be removed by the court, does not render them mere agents of the court, nor does it impose upon the court the duties to be discharged by them. The act is not, in our opinion, invalid for the reasons urged.

This disposes of all the questions involved, and as we are of opinion that the court erred in referring the matter to the commissioners of drainage without proof that notice had been given, as required by the statute, the judgment should be reversed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment should be reversed, at the appellees' costs, the reference set aside, and for further proceedings.

Newman v. Manning.

No. 10,396.

NEWMAN v. MANNING.

JUDGMENT.—*Evidence.*—*Jurisdiction.*—*Former Recovery.*—*Record of Justice.*—

The record of a judgment of a justice of the peace, or other court of inferior and limited jurisdiction, in order to be valid evidence of a former recovery, must show affirmatively that jurisdiction was acquired.

SAME.—*Attachment.*—*Garnishment.*—*Notice.*—*Publication.*—In an attachment case before a justice of the peace, wherein the summons against the principal defendant has been returned unserved, and no property has been attached, there can not be entered a valid judgment against a garnishee until after due notice by publication to the principal defendant has been had; and that it has been had must be shown by the record.

SAME.—In such case, the record being silent, it is not competent to supplement it by proof that the proper notice was published, and that the principal defendant had knowledge of the action before judgment was taken against the garnishee.

PRACTICE.—*Depositions.*—Motions to quash depositions should be made before the commencement of the trial.

From the Hendricks Circuit Court.

C. C. Nave, for appellant.

L. M. Campbell, for appellee.

WOODS, C. J.—This is the second appeal in this case. See *Newman v. Manning*, 79 Ind. 218. No change has been made in the pleadings except that on the return of the case to the circuit court the demurrer to the second paragraph of the reply was sustained. The second finding and judgment were for the appellee, the amount of the recovery being \$171. The principal question to be considered is whether or not the finding is contrary to the evidence.

The burden of the issue was upon the appellant. His effort was to show that he had been compelled to pay the amount due upon the note in suit upon certain judgments in garnishment before he had notice of the assignment to the plaintiff.

The evidence fails to make out a complete defence, because some of the judgments against him as garnishee were rendered by a justice of the peace who did not acquire jurisdiction.

Newman v. Manning.

The doctrine is well settled that the record of a judgment, rendered by a justice of the peace or other tribunal of inferior and limited jurisdiction, in order to be valid, must show affirmatively that jurisdiction was acquired. *Wilkinson v. Moore*, 79 Ind. 397; *Nicholson v. Stephens*, 47 Ind. 185. And where, as in this case, in a proceeding in attachment before a justice of the peace, the summons against the principal defendant is returned without service, and no property has been attached, there can not be a valid judgment against a garnishee defendant until after notice by publication to the principal defendant, and that such publication has been had should be shown by the record of the judgment. *Ohio, etc., R. W. Co. v. Alvey*, 43 Ind. 180; *Toledo, etc., R. W. Co. v. McNulty*, 34 Ind. 531; *Andrews v. Powell*, 27 Ind. 303; *Johnson v. Johnson*, 26 Ind. 441; *Richardson v. Hickman*, 22 Ind. 244; *Schoppenhast v. Bollman*, 21 Ind. 280; *Harmon v. Birchard*, 8 Blackf. 418. It follows that there was no error in excluding testimony offered for the purpose of showing that the proper notice was in fact published, and that the principal defendant had actual knowledge of the action before judgment was taken against the appellant as garnishee.

The objections made to the reading of certain depositions because irrelevant and incompetent were properly overruled.

The depositions were competent, and, if it had been otherwise, there should have been a motion to quash before the trial was entered upon. *McGinnis v. Gabe*, 78 Ind. 457; *Truman v. Scott*, 72 Ind. 258.

Judgment affirmed.

Opinion filed at the November term, 1882.

Petition for a rehearing overruled at the May term, 1883.

Mullany et al. v. First National Bank of Indianapolis.

No. 9425.

MULLANY ET AL. v. FIRST NATIONAL BANK OF INDIANAPOLIS.

BILL OF EXCEPTIONS.—Practice.—Prior to the act of 1881, R. S. 1881, section 626, a ruling made during the trial could not be brought into the record for review in the Supreme Court by a bill of exceptions filed on time granted, at a subsequent term, at which a motion for a new trial was overruled.

From the Superior Court of Marion County.

J. R. Parmelee, L. L. Norton and A. Holladay, for appellants.
T. S. Rollins and G. W. Stubbs, for appellee.

BICKNELL, C. C.—This was an action by the appellee against the appellants upon a promissory note not payable at a bank in Indiana, alleged to have been made by the appellants Mullany & Hayes, payable to the order of the appellant Dennis J. Mullany, and by him assigned to one Catherwood, who assigned it to the appellee before its maturity.

The appellants Mullany & Hayes answered that the appellee was not the real owner of the note; that it was never assigned by Dennis J. Mullany, and that at the commencement of the suit he was the lawful owner of the note. This answer was duly verified.

The appellant Dennis J. Mullany answered under oath denying the assignment of the note by him. He also filed a cross complaint demanding the possession of the note.

The issues joined upon the complaint and cross complaint and the answers thereto were tried by the court who found that Mullany & Hayes were indebted to the plaintiff in the amount of the note and interest, and that Dennis J. Mullany had no right to the note.

Judgment was rendered upon the finding. Mullany & Hayes moved jointly for a new trial, alleging that the finding was not sustained by sufficient evidence, was contrary to the evidence, and contrary to law.

Mullany et al. v. First National Bank of Indianapolis.

Dennis J. Mullany moved separately for a new trial, alleging the same reasons, and also error of the court in admitting evidence, but the objection to the evidence could not be considered, because it was not saved by a proper bill of exceptions taken at the time of the trial, at the May term, 1880. The court, on overruling the motions for a new trial at the June term, 1880, granted time to file a bill of exceptions, and within that time a bill of exceptions was filed, which brings up the evidence, but not exceptions to rulings made at a previous term. *Backus v. Gallentine*, 76 Ind. 367; *Pitzer v. Indianapolis, etc., R. W. Co.*, 80 Ind. 569. The motions for a new trial were overruled, and all the defendants appealed from the judgment to the superior court in general term, where they jointly assigned errors as follows:

1. Error in overruling the motions for a new trial.
2. That the complaint does not contain facts sufficient, etc.

The court in general term affirmed the judgment of the court in special term, and the defendants appealed to this court.

Here they assign as error the affirmance of the judgment of the court in special term. The only matters urged by the appellants now are, that the finding was not sustained by sufficient evidence, and is contrary to law. As there was evidence tending to sustain the finding, this court can not disturb it. *Walker v. Beggs*, 82 Ind. 45.

The judgment ought to be affirmed.

PER CURIAM.—It is therefore ordered, on the foregoing opinion, that the judgment of the superior court in general term be, and the same is hereby, in all things affirmed, at the costs of the appellants.

Opinion filed at the November term, 1882.

Petition for a rehearing overruled at the May term, 1883.

Stephenson v. Arnold.

59 498
124 438

10,499.

STEPHENSON v. ARNOLD.

STATUTE OF FRAUDS.—Contract.—Whenever so much of a contract as would otherwise be within the statute of frauds is executed, the remaining stipulations may be enforced.

VENDOR AND VENDEE.—Contract.—Title.—When a vendor actually secures to his vendee the title contracted for orally, the purchase becomes valid, and the purchaser is bound for the purchase-money, according to the terms of his promise.

From the Washington Circuit Court.

D. M. Alspaugh, J. C. Lawler, — *Mitchell* and — *Mitchell*, for appellant.

S. B. Voyles, H. Morris, J. A. Zaring and *H. Heffren*, for appellee.

ELLIOTT, J.—In the case of *Arnold v. Stephenson*, 79 Ind. 126, we held the appellee's complaint sufficient, and that ruling controls the case throughout all its subsequent stages, so that, if we were disposed to change our decision, a settled principle would prevent us from doing so. We have not, however, the slightest reason to doubt the soundness of our former decision. The proposition there laid down is, that when that part of a contract is executed which is within the statute of frauds, all the remaining stipulations become valid and enforceable. This is good law. *Day v. Wilson*, 83 Ind. 463 (43 Am. R. 76); *Schenck v. Sithoff*, 75 Ind. 485; *Tinkler v. Swayne*, 71 Ind. 562; *Reyman v. Mosher*, 71 Ind. 596; *Humphrey v. Fair*, 79 Ind. 410; *Curran v. Curran*, 40 Ind. 473; *Smith v. Felton*, 85 Ind. 223; *McOuat v. Cathcart*, 84 Ind. 567; Browne Stat. Frauds, sec. 117. The complaint now before us is substantially the same as that passed upon in our former decision, and must be held sufficient.

There is much conflict in the evidence as to the character of the agreement between the parties, but we think there is evidence fairly supporting the verdict. The testimony of Horace Heffren is very full, and is of itself sufficient to sup-

Stephenson v. Arnold.

port the finding upon this point. The testimony of this witness shows a sale of the land by the appellee to the appellant. The agreement which this witness testifies to was one wherein the appellee sold the land to the appellant, the latter undertaking to pay for it \$6,000, payment to be made partly by discharging claims against the former, and partly in money. The contract stated in this testimony was one of sale outright, and not merely an agreement to buy the land at the sheriff's sale and hold it for the appellee. The only particular in which the contract differed from ordinary contracts for the sale of land is, that one of the conveyances was to be taken from the sheriff.

The fact that a contract for the sale of lands provides for a conveyance by a third person does not prevent its enforcement by the vendor in case the conveyance bargained for is executed or tendered. The case is in principle the same as that of *Schenck v. Sithoff, supra*. It certainly can make no difference whether the title comes from the vendor himself or some third person, for if the purchaser gets title he is, to borrow the language used in the case cited, "as much bound to pay the price as if a deed had been bargained for and made."

Where a vendor offers to the purchaser or fully secures to him the title contracted for, he is entitled to recover the purchase-money, although the contract was by parol. The promise to pay the price is not within the statute, and when the agreement to convey is carried into effect recovery may be had on the promise, for in such a case that part of the contract within the statute is executed. This is the rule declared in the cases cited, and it is a just and equitable one. It would be inequitable to permit a purchaser to get the real estate he bargained for, and by the title for which he contracted, and then escape payment of the agreed price.

The appellee, in his own testimony, did not state the agreement between him and the appellant as favorably to himself as some of the other witnesses, and counsel insist that the case should be decided upon his own testimony. We do not think the jury were bound to act upon the appellee's testimony, to

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the exclusion of other evidence; we think they had a right to consider his intellectual capacity, his memory, the accuracy of his knowledge of language and like matters, and, taking all these things into consideration, determine whether he or the other witnesses stated the agreement with the most accuracy and fulness. It was the duty of the jury to arrive at the truth from all of the witnesses, and not act upon the testimony of one of them alone, unless they believed it to be the more accurate and complete.

There are some circumstances seemingly inconsistent with the appellee's theory of the case, but the jury had all the facts before them, and, with ample opportunity for securing full knowledge of the facts, found in favor of the appellee, and we can not interfere with their finding.

Judgment affirmed.

Opinion filed at the November term, 1882.

Petition for a rehearing overruled at the May term, 1883.

No. 10,100.

THE NEW MARKET NATIONAL BANK *v.* LOCKE ET AL.

PARTNERSHIP.—Individual Liability.—Creditors.—A partnership creditor is not entitled to pro-rate with individual creditors in individual property.

SAME.—Decedents' Estates.—Administrator de son Tort.—Suit to recover the amount of a bill of exchange drawn by partners, upon the ground that the defendants were liable as administrators *de son tort* of one of the partners who was dead. Answer, that the surviving partner had assets as such sufficient to pay all partnership liabilities, and that the defendants had applied all the property of the deceased to the discharge of his individual liabilities.

Held, that the answer was good on demurrer.

From the Vigo Circuit Court.

G. W. Kleiser and J. H. Kleiser, for appellant.

S. C. Stimson, R. Dunnigan and R. B. Stimson, for appellees.

The New Market National Bank *v.* Locke *et al.*

FRANKLIN, C.—Appellant sued appellees Leander Locke and Simeon Locke on a bill of exchange executed in the State of Alabama by Joseph H. Locke, Sr., and Joseph Locke, Jr., as partners, under the firm name of J. H. Locke & Son, alleging that Joseph H. Locke, Sr., had died in Vigo county, Indiana, the owner of a large amount of personal property ; that after the death of said Joseph, Sr., appellees unlawfully, and without taking out letters of administration, intermeddled with, took possession and disposed of all said personal property, and converted the proceeds thereof to their own use ; and that afterwards James H. Kleiser was appointed administrator of said estate, and that said bill of exchange had been filed by the plaintiff as a claim against said estate ; that the defendants had become and were chargeable as administrators *de son tort* ; that plaintiff, as a creditor of said estate, has become and is damaged by said intermeddling and conversion in the sum of \$400, and praying that the defendants be required and compelled to account to said administrator for the value of all of said property that they may have sold, and appropriated the proceeds to their own use.

To this complaint the defendants answered, first, by admitting the bill of exchange, and averring that at the time of decedent's death he and said Joseph H. Locke, Jr., were still co-partners, as when the bill was drawn, and decedent left his partner in business, and that the firm was solvent, and the surviving partner had sufficient partnership assets to pay all its liabilities, including the bill of exchange ; that decedent left a widow, who was entitled to her share of said estate, these defendants and two other children as his heirs ; that he was individually liable for a large amount of money ; that his widow took and kept possession of a large portion of his estate ; that these defendants took possession of his stock of goods and business, to prevent it being wasted ; that the same did not exceed \$—— in value, and that they have paid all of said debts, amounting to more than the value of the assets taken by them, etc.

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A demurrer was sustained to the second paragraph. The defendants afterwards filed a third and additional paragraph, which stated the same facts more specifically, and averred that they took possession of the property by an agreement with the widow and all the heirs, for the purpose of continuing the business, for its main value depended upon its continuance without intermission, and defendants agreed to pay out of said goods and business and the proceeds thereof the individual debts of the decedent; and they aver that they have paid all such debts against said estate, amounting to \$5,000, and fully settled with the widow and all the heirs, before the appointment of any administrator, and before any application therefor had been made; that said administrator was not a creditor or heir, but a stranger to said estate; that there was no estate then to be administered, and that neither the widow nor any of the heirs had any notice of said application until months after the appointment had been made.

There was a demurrer overruled to this paragraph of answer, and a reply in denial filed. There was a trial by the court, and, at the request of defendants, the court made a special finding, and stated its conclusions of law, in favor of the defendants. A motion for a new trial was overruled, and judgment rendered for the defendants. The errors assigned are:

1st. Overruling the demurrer to the first paragraph of the answer.

2d. Overruling the demurrer to the third paragraph of the answer.

3d. Overruling the motion for a new trial.

The demurrs to both paragraphs of the answer may be considered together.

The first objection made to these paragraphs of answer is that they do not answer the whole complaint; that they only admit the taking possession of the stock of goods. We think they are more comprehensive than thus construed; they admit the taking possession of the stock of goods and the business of the decedent—this includes all the property he

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owned in connection with his business; and they aver that they had paid all the individual indebtedness of the decedent, and that such indebtedness amounted to more than the value of all the property that they had so taken possession of; that the partnership was solvent, and the surviving partner had in his hands sufficient partnership assets to pay all the partnership debts, including the plaintiff's claim. A partnership creditor is not entitled to pro-rate with individual creditors in individual property. We think these paragraphs answer the whole complaint.

The next objection to these paragraphs of answer is that they are pleaded in bar, when they can only be considered in mitigation; that even if the defendants had paid the individual debts, amounting to more than the value of the property taken by them, they would still be liable as intermeddlers for nominal damages. This might be true if the suit had been brought in the name of the administrator, who was entitled to the possession of the property; but even then a judgment will not be reversed where only nominal damages are involved. Though in this case, the action being in the name of a creditor, who was not entitled to the possession of the property, he could not maintain an action for nominal damages; he could only recover for substantial damages. The 15th section of the act for the settlement of decedents' estates, 2 R. S. 1876, p. 495, under which this suit was commenced, provides that a creditor can only recover to the extent of the damages occasioned by the intermeddling. Appellant admits that the appellees are entitled to a credit for what they have paid upon the individual indebtedness of decedent. We think the paragraphs are sufficient in bar to answer plaintiff's complaint. There was no error in overruling the demurrers to them.

Under the third error assigned, the overruling of the motion for a new trial, it is insisted that the evidence does not sustain the finding of the court.

We can not state the substance of the evidence better than to-

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give the special findings of the court, which are not lengthy and read as follows : "That on the 16th day of January, 1879, Joseph H. Locke departed this life in the city of Terre Haute, Vigo county, Indiana, intestate, leaving the defendants and others, Joseph H. Locke, Jr., and Mary A. Walmsley, his children, and Nancy Locke, his widow ; that at the time of his death he was the owner of individual personal property of the value of \$3,000, consisting of a stock of goods, mainly the value of all the property left by decedent in Terre Haute, not exceeding in value \$3,000 ; that at the time of the death of decedent he owed individual creditors to the amount of \$3,500 ; that, at the time of the death of decedent, J. H. Locke, son of decedent, with the consent of the widow and heirs, took possession of the entire property, and sold and disposed of the same from time to time, and applied the proceeds to the payment of the individual debts of decedent ; that by so doing he was enabled to pay all the individual debts of decedent, and pay the widow her \$500 ; that all the individual debts of decedent, under the arrangement herein mentioned, were fully paid before the commencement of this suit, to the satisfaction of the individual creditors, widow and heirs of decedent ; that at the time of the death of decedent said firm was solvent, and worth \$———, clear of liabilities ; that on June 12th, 1873, said firm of J. H. Locke & Son drew the bill of exchange, in the complaint mentioned, for \$261.15, of which the complainant is now the owner ; that the same has never been paid ; that said assets of said firm were in existence in Mobile, in the hands of J. H. Locke, surviving partner, at the time of the commencement of this suit ; that no steps have been taken in the State of Alabama to enforce the collection of said bill of exchange ; that no portion of the assets of the firm in Alabama are in the hands of the defendants herein ; that the said bill of exchange is the only debt of said firm unpaid."

Upon the foregoing facts the court finds the following conclusions of law :

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"1st. That the individual property of decedent was first liable for his individual debts.

"2d. That as the defendants had applied all the individual property of decedent to the payment of all his individual debts, with the consent of his widow and heirs, before the commencement of this suit, leaving no surplus, they are not chargeable in this action as administrators of their own wrong, and are not liable to account to the administrator of decedent's estate since appointed for the property so applied. The court, therefore, finds for the defendants."

We have carefully examined the evidence, and, although in some respects conflicting, we think it fully sustains the special findings of the court, and they sustain the general finding. There is no error in overruling the motion for a new trial.

This case having been tried since the Revised Statutes of 1881 went into force, a question might be raised as to whether it could be prosecuted in the name of a creditor while there was an administrator of the estate; but this question is not presented or discussed by counsel.

We find no available error in the record. The judgment ought to be affirmed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment of the court below be and it is in all things affirmed, with costs.

No. 10,217.

AYERS, GUARDIAN, v. SLIFER ET AL.

VENDOR AND VENDEE.—*Fraud.—Contract.—Sheriff's Sale.—Redemption.—Deed.—Consideration.—Agreement.*—O., a weak-minded, confiding old man, owned 300 acres of land, worth \$18,000, which had been sold on execution for \$2,138.92, subject to a mortgage of \$5,000, and the sheriff's certificate was held by L., who, with S. and F., confederated for the purpose of swindling O. out of the land and dividing its proceeds amongst them-

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selves. The plan was to prevent O. from redeeming from the sheriff's sale. S., who was wealthy and had the unbounded confidence of O., became his adviser, and professing much friendship and sympathy for O., who was embarrassed financially and also in domestic trouble, and by orally agreeing to purchase 180 acres of the land at a price and terms, for cash, which would afford money in time to redeem, and more than enough also to discharge the mortgage, he prevented O. from making another arrangement to redeem, and then by divers falsehoods and tricks avoided the performance of his agreement until the year for redemption had expired and L. had obtained a sheriff's deed. Then, by like fraudulent devices, he obtained from O. a quitclaim of all his land, upon the agreement that if he succeeded in getting in the title conveyed by the sheriff he would still comply with his parol contract to purchase. Upon learning how he had been cheated, O. brought suit to vacate his deed to S., but was defeated because he had not tendered the money paid to the sheriff. *Held*, that upon these facts O. would recover from S., as in *indebitatus assumpsit*, the price of the 180 acres as agreed by the oral contract, and the value of the residue of the land less the encumbrances.

From the Decatur Circuit Court.

J. D. Miller, F. E. Gavin, W. A. Moore and B. F. Bennett, for appellant.

T. B. Adams and L. T. Michener, for appellees.

HAMMOND, J.—This was an action by the appellant, as guardian of Joseph Owens, a person of unsound mind, against the appellees, to recover the price or value of real estate conveyed by quitclaim deed by said Joseph Owens to the appellee, Philip Slifer.

The transactions upon which the appellant bases his right to recover occurred before Owens was placed under guardianship. A demurrer was sustained to the appellant's complaint. He excepted to this ruling, and his assignment of error in this court requires us to pass upon the question of the sufficiency of his complaint. The complaint is of too great length to admit a copy in this opinion, but the following summary of its contents will exhibit the substantial facts on which the appellant predicates his claim for a recovery:

Joseph Owens was the owner in fee simple of 300 acres of land in Decatur county, of the value of \$18,000. It was in-

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cumbered by a mortgage of \$5,000, executed January 15th, 1877, by him and his wife to a certain mortgage and trust company. Afterwards, on October 6th, 1877, February 25th, and March 2d, 1878, three several judgments, which became liens upon his real estate, were rendered against him in the Decatur Circuit Court, amounting in the aggregate to about \$1,800. All of his real estate was sold under executions issued on these judgments, on November 16th, 1878, to the appellee Isaac Tindall, for \$2,138.92. Tindall, a few days after the sale, assigned a one-half interest in his certificate of purchase to the appellee Philip Slifer, and soon afterwards Tindall and Slifer assigned said certificate to the appellee John C. F. Leach. After the sheriff's sale, and long before the expiration of the time for redemption, Owens, with the view of redeeming, commenced efforts to find a purchaser for the whole or part of the land. He received a verbal offer of \$10,000 for the whole of it from one Benjamin McCoy, a man of wealth and responsibility. Out of this offer, if accepted, the incumbrances were to be first discharged and the residue was to be paid to Owens. At that time Owens was an old man, of the age of 75 years. He was in great distress by reason of his financial condition and by domestic affliction, his wife having left him and obtained a divorce and a division of his property. His mind was feeble and imbecile and his disposition docile and trusting to an extent that incapacitated him from transacting any but the simplest business. The appellees, knowing of his said mental and financial condition, and of his efforts to preserve a portion of his estate, conspired and confederated together, by certain false representations and promises, to prevent the redemption of his land, and to divide the same among themselves. Slifer was a man of wealth and a near neighbor, made great pretensions of friendship and had the unbounded confidence of Owens. The latter confided to him all his secrets and troubles, both in business and family affairs. He was ignorant of Slifer's interest in the real estate through all these transactions, up to and includ-

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ing the execution of the deed hereafter mentioned. Carrying out the conspiracy entered into by the appellees, Slifer persuaded Owens not to accept McCoy's offer, promising him that he himself would purchase enough of the land to enable Owens to redeem. About two months before the expiration of the time for the redemption, he arranged verbally with Owens to purchase 160 acres of the land for \$7,200, and 20 acres more of the value of \$1,000, at a reasonable price, to be fixed by two disinterested neighbors. This would have paid off the encumbrances and left Owens \$1,000 in money and 120 acres of land. Slifer represented to Owens that before this contract could be carried out it would be necessary to see Tindall, who, as Owens supposed, held the sheriff's certificate of purchase. Slifer, from the averments of the complaint, seems to have impressed Owens with the conviction that an accommodation with Tindall must precede the closing up of his contract of purchase of the land. As part of the program of deception he went with Owen's son to see Tindall, and requested him to assign the certificate of purchase to him (Slifer). Tindall at first declined; but, Slifer simulating a great desire and earnestness to assist Owens, Tindall finally pretended to consent to such assignment. Slifer and Tindall then fixed the following Wednesday as the time to meet Owens at Shelbyville to close up the contract for the purchase of part of the land by Slifer, and for the redemption from the sheriff's sale, or the purchase of the certificate from Tindall. On the day before the time agreed upon to go to Shelbyville, Tindall sent word that he was sick and unable to attend to business. Slifer and Owens, a week afterwards, went to Tindall's residence to see him, but he was absent. They also made a second visit for the same purpose, but he was again from home. Leach, Tindall's nephew, was there and informed them that Tindall would not be home for several days. Slifer told Owens that he could not purchase in Tindall's absence. Tindall's absence from home on these occasions was part of the plan of deception to cause delay, and to prevent Owens from redeeming

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his land. Slifer had no intention of purchasing part of the land. Owens, however, ignorant of the deception being practiced upon him, had no suspicion of Slifer's bad faith. Slifer now represented to Owens that it was not necessary to do anything further until the last day for redemption, and promised that he would on that day have the money for the purchase under his agreement, and that they would then go and see Tindall, and redeem from the sheriff's sale. Owens, confiding in these promises, made no further effort to sell his land or to procure money for the redemption of it. Slifer again put Owens off by telling him that as November 16th, 1879, came on Sunday, the day following would be in time for redemption, and that he had arranged with Tindall to meet at Shelbyville, on November 18th, 1879, to pay the money and redeem the land. He assured Owens that this would be in ample time. Owens, on account of his weak and imbecile mind and his confidence in Slifer, gave full belief to these representations. At the time named Owens and Slifer went to Shelbyville. Tindall failed to meet them. Slifer affected great surprise at Tindall's conduct. Leach on the same day went to the sheriff of Decatur county and procured a sheriff's deed on the certificate of purchase. When Owens, a day or two afterwards, ascertained that the time for redemption was passed, and that a sheriff's deed had been made, he became greatly distressed. While he was in this condition Slifer called on him, two days after the Shelbyville trip, in the evening, after dark, and informed him that he had consulted Ed. P. Ferris, Esq., an attorney at Shelbyville, and that Ferris had advised that the only proper way for Owens to arrange his affairs would be to execute to him (Slifer) a quitclaim for all his land. He informed Slifer that Ferris was going away from home and had directed him (Slifer) to have the papers drawn up. Ferris was Owens' legal adviser—a fact well known to Slifer. These statements in reference to Ferris were false. Slifer had not seen him, nor had he given any such advice. Owens, at Slifer's request, went with him, November 21st, 1879, to Shelbyville,

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and was conducted to the law office of John A. Tindall, Esq., a relative of the appellee Tindall. The attorney drew up a quitclaim deed, and Owens executed it, conveying all his real estate (the 300 acres before mentioned) to Slifer—Slifer at the time agreeing that if he succeeded in procuring from Tindall the land, he would comply with his contract of purchase. During all this time Owens was ignorant of any assignment of the certificate of purchase by Tindall, and also ignorant of Slifer having any interest in the matter. The appellees purposely withheld from him the true condition of affairs, the better to carry out their plans of deception to swindle him out of his land. A few days after receiving the sheriff's deed Leach conveyed the land by quitclaim deed to Slifer, and the latter reconveyed 120 acres to Leach. Owens, on learning of the swindle, brought suit against the appellees to set aside his deed to Slifer, but was defeated on account of not having tendered the purchase-money at the sheriff's sale, with interest. He was subsequently, in the proper judicial proceeding, declared to be of unsound mind, and the plaintiff was appointed his guardian. Neither Owens nor the appellant has been able to redeem the land, for the want of means. This action is brought to recover damages.

The above facts, taken from the appellant's complaint, so far as they are well pleaded, are admitted by the appellees' demurrer to be true. The appellees' demurrer being joint, it should have been overruled, if the complaint is good as against either of the appellees. 1 Works Prac., section 531.

The complaint shows with reasonable probability that Owens was prevented by the appellees from redeeming his land within the time fixed by law. The expiration of the statutory period for redemption did not, therefore, deprive him of that right. *Plaster v. Burger*, 5 Ind. 232. An agreement between the parties may have the effect to extend the time of redemption beyond the year allowed therefor. *Hughart v. Lenburg*, 45 Ind. 498; *Spath v. Hankins*, 55 Ind. 155. We think, under

Ayers, Guardian, v. Slifer *et al.*

the facts stated in the complaint, that Owens, before he executed the deed to Slifer, had, in equity, an unquestionable right of redemption. This being the case, it can not be said, as counsel for the appellees insist, that Owens, in executing the deed to Slifer, did not part with any valuable right. If he did not entirely part with his right of redemption, the deed made such redemption more difficult, because it imposed upon him at least the additional proof of showing that the deed was procured by fraud. The quitclaim deed was, therefore, of benefit to Slifer and prejudicial to Owens. It would have furnished a valuable and sufficient consideration for a contract based upon it. The whole transaction, as developed in the complaint, shows that Owens, when he made the deed to Slifer, expected in some way to be benefited. There is nothing from which it may be inferred that he intended the right conveyed as a gift. Can the appellant, then, in this action recover in damages for the interest in real estate with which Owens divested himself by his deed to Slifer? The complaint shows that the deed was made pursuant to a verbal contract as to 180 acres of the land embraced in it. The execution of a deed upon an oral agreement takes the case out of the statute of frauds. *Curran v. Curran*, 40 Ind. 473; *McOuat v. Cathcart*, 84 Ind. 567; *Tinkler v. Swayne*, 71 Ind. 562; *Humphrey v. Fair*, 79 Ind. 410; *Day v. Wilson*, 83 Ind. 463 (43 Am. R. 76); *Stephenson v. Arnold*, *ante*, p. 426.

An action upon account, or what at common law is known as *indebitatus assumpsit*, lies to recover the price or value of land conveyed by deed. *Rinker v. Sharp*, 5 Blackf. 185; *Curran v. Curran*, *supra*.

We are of opinion that, under the allegations of the complaint, the appellant is entitled to recover on the conveyance made by Owens to Slifer the price of the land so far as agreed upon, and the value as to the residue, less the encumbrances, which in case of a recovery should be discharged by the party or parties against whom the recovery may be had.

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We think there was error in sustaining the demurrer to the appellant's complaint.

Judgment reversed, with instructions to the court below to overrule the appellees' demurrer to the appellant's complaint, and for further proceedings in accordance with this opinion.

89	440
126	481
89	440
129	462
89	440
153	494
89	440
162	276

No. 9438.

HARDY ET AL. v. MILLER ET AL.

REVIEW OF JUDGMENT.—Where a judgment sought to be reviewed was on default, after due service of process, the complaint being sufficient to withstand a demurrer, a complaint for review can not be maintained.

MORTGAGE.—Husband and Wife.—Wife's Inchoate Interest in Real Estate.—

Appearance.—Waiver.—A wife whose inchoate interest in real estate has become absolute by a judicial sale, under sec. 2508, R. S. 1881, is entitled, in a suit to foreclose a mortgage which she joined her husband in executing, if she appears and demands it, to an order in the decree directing that the husband's interest be first offered for sale, and that, if it brings a sufficient sum to pay the debt, her interest be not sold.

Quare, whether she waives such right by failing to appear and assert it.

From the Montgomery Circuit Court.

A. W. Caldwell, J. L. Caldwell, H. W. Chase, F. S. Chase and F. W. Chase, for appellants.

G. W. Stubbs and T. S. Rollins, for appellees.

ELLIOTT, J.—The appellees are husband and wife, and prosecute this action for the review and vacation of a decree of foreclosure rendered on default against them upon a mortgage executed to Ainsworth H. Byrns, who has died since the rendition of the decree. The appellants are the heirs and the administrator of the deceased mortgagee.

The ground upon which the appellees place their right to the relief sought is, that Elizabeth Miller is a married woman, whose interests have been severed from those of the husband by an adjudication in bankruptcy, and that she was, therefore,

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entitled to a decree that the husband's interest be first sold, and in case it should bring a sum sufficient to pay the mortgage debt, that the interest of the wife should not be subjected to sale; and that, as this provision was not embodied in the decree, she is entitled to have it set aside.

In cases of mortgages executed since the act of 1875 became a law, and in which there has been a severance of interests by a judicial sale, the wife is entitled, if she appears and asserts her right, to have a provision inserted in the decree, directing that the husband's interest in the mortgaged property be first offered for sale, and that if it brings a sufficient sum to pay the mortgage debt, her interest shall not be sold. She is not, of course, entitled to have any of the property released, unless the husband's interest sells for a sum sufficient to discharge the mortgage debt; but she has a right, where she properly asserts it, to a provision directing that his interest be first offered for sale. *Grave v. Bunch*, 83 Ind. 4; *Leary v. Shaffer*, 79 Ind. 567; *Medsker v. Parker*, 70 Ind. 509. Whether she waives this right by failing to assert it is not decided in any of our cases, nor do we feel called upon to decide it in the present case.

The complaint in the foreclosure suit entitled the plaintiff therein to some relief, and the relief granted was relevant to the case made by the pleading. If there was any error at all it was in the provisions of the decree, for the complaint was sufficient, process was duly served, and all proceedings were strictly regular. In such a case a bill of review will not lie. This subject is so fully considered and so well discussed in the opinion of the court prepared by Commissioner BEST in *Searle v. Whippelman*, 79 Ind. 424, that further discussion is needless. *Tachau v. Fiedeldey*, 81 Ind. 54.

Judgment reversed.

Opinion filed at the November term, 1882.

Petition for a rehearing overruled at the May term, 1883.

Lowry v. Reed.

No. 10,108.

LOWRY v. REED.

EXECUTION.—*Lien.*—Where judgment liens on land accrue at the same time, the execution first issued and levied gives priority.

SAME.—*Sheriff's Sale After Return Day.*—If an execution be levied on land before the return day, a sale afterwards will be valid.

From the Cass Circuit Court.

M. Winfield and Q. A. Myers, for appellant.

S. T. McConnell, R. Magee and D. B. McConnell, for appellee.

BICKNELL, C. C.—The appellant obtained a judgment against George Adams, on February 13th, 1878. The appellee obtained a judgment against the same defendant on February 20th, 1878. Executions on these judgments came to the hands of the sheriff on the same day. Edward L. Adams became replevin bail on each of the judgments on the same day. George Adams had no property subject to execution, and Edward L. Adams had none except the land in controversy. Afterwards, on December 6th, 1878, the appellee had an execution issued on his judgment against the principal and the replevin bail, which execution was levied on the land in controversy on June 4th, 1879. Under this execution the land was sold to the appellee on June 27th, 1879, and he obtained the sheriff's deed therefor on August 4th, 1880, and is in possession.

The appellant had execution issued on his judgment against the principal and replevin bail on July 22d, 1879, and under that execution he bought the land at sheriff's sale, on August 15th, 1879, and a year afterwards obtained the sheriff's deed therefor.

The appellant claims that the sale to the appellee was void and gave no title, because it was made after the return day of the writ. This is the only question in the case. The property having been levied upon on the return day of the writ, the levy was in time. *Maud v. Barnard*, 2 Burr. 812.

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There can be no valid sale after the return of the writ. *Clerk v. Withers*, 6 Mod. 290; *Wilbraham v. Snow*, 2 Saund. 47. But where an execution has been commenced before it may be completed after the return day. *Ewing v. Hatfield*, 17 Ind. 513. It has been repeatedly decided that a sale on execution after the return day is valid, if the levy was in time. *Tillotson v. Doe*, 5 Blackf. 590, and cases there cited.

The property being unsold, the writ might have been returned and another execution issued forthwith, reciting the return of the former execution and the levy and failure to sell, and directing the sheriff to satisfy the judgment out of the property remaining unsold. 2 R. S. 1876, p. 212, section 454. But this statute has been held to be merely directory. *Zug v. Laughlin*, 23 Ind. 170, 174. Non-compliance with it did not make the sale after the return day void.

Where the sheriff holds executions issued on judgments of different dates against the same defendant, each judgment becomes a lien upon the real estate of the defendant at the date of its rendition, and if the sheriff levies any one, even the youngest of such executions, upon the real estate and sells it, he must apply the proceeds of the sale in payment of the judgments in the order of their seniority. *State, ex rel., v. Sayers*, 19 Ind. 432. But where judgments against the same person are of even date, or where they become liens on real estate at the same time, as where the judgment debtor acquires the property after the rendition of the judgments, then the creditor whose execution is first issued and levied will have the preference. *Adams v. Dyer*, 8 Johns. 347 (5 Am. Dec. 344); *Waterman v. Haskin*, 11 Johns. 228; *Michaels v. Boyd*, 1 Ind. 259.

In the case at bar the judgments against the replevin bail became liens on his property on the same day; neither had any priority over the other. "Every recognizance of bail * * * shall have the effect of a judgment confessed, from the date thereof, against the person and property of the bail." 2 R. S. 1876, p. 203, section 427.

Perrill, Administrator, v. Nichols.

The appellee, by his superior diligence in issuing and levying his execution, secured the preference. The judgment ought to be affirmed.

PER CURIAM.—It is therefore ordered, on the foregoing opinion, that the judgment of the court below be and it is hereby in all things affirmed, at the costs of the appellant.

Opinion filed at the November term, 1882.

Petition for a rehearing overruled at the May term, 1883.

86	444
181	388
89	444
144	362

—♦—
No. 9562.

PERRILL, ADMINISTRATOR, v. NICHOLS.

CHANGE OF VENUE.—Jurisdiction.—Practice.—There was a change of venue granted without objection, and on cause properly shown, to a court having no jurisdiction of the subject, and accordingly it returned the papers. *Held*, that this afforded no reason for a dismissal of the cause.

Held, also, that on the return of the papers it was proper to change the venue to a court having jurisdiction to try the cause.

STATUTE OF LIMITATIONS.—Mutual Accounts.—Where the items of an account on the credit side are wholly for payments, the account is not mutual in the sense of section 295, R. S. 1881, so that the statute of limitations will not begin to run until the date of the last item on either side; but in such case the statute will be a bar, except as to items of indebtedness within six years.

DECEDENTS' ESTATES.—Witness.—Discretion.—The action of a trial court in requiring a witness, not otherwise competent, to testify as authorized by the act of 1879, Acts 1879, p. 245, was the exercise of an absolute discretion which could not be controlled by the Supreme Court.

SAME.—Statute of Limitations.—Pleading.—The statute of limitations is available, without pleading it, as a defence to a demand against the estate of a decedent.

SAME.—Estoppel.—Judgment.—Deed.—Consideration.—A large claim against a decedent's estate (\$7,000), on which \$2,500 was allowed, was defended on the ground of estoppel by a judgment rendered in a suit by the administrator against the claimant to set aside a conveyance by the intestate of lands and a conveyance of his grantee to the claimant, with a view to make assets, for the reasons that the conveyances were without consid-

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eration, and that the grantor was, at the time, *non compos mentis*, which facts the grantee knew, and there had been a finding for the administrator that the causes alleged were true, and a decree accordingly. It appeared that upon that trial the facts involved in the present case had been substantially "gone over."

Held, that the finding and judgment did not estop the claimant.

From the Marion Circuit Court.

A. F. Shirts, G. Shirts, W. R. Fertig, A. C. Ayres and E. A. Brown, for appellant.

BLACK, C.—This is an appeal taken by the administrator of the estate of George W. Nichols, deceased, from a judgment allowing a claim of the appellee against said estate.

The claim was filed in Hamilton county. In the Hamilton Circuit Court, the claimant moved for a change of venue from the county. The motion was sustained, and the court ordered that the venue be changed to the superior court of Marion county.

A transcript of the proceedings in the Hamilton Circuit Court and the papers in the cause were transmitted to the clerk of the Marion Superior Court. That court, on the ground that it had not jurisdiction of the subject-matter, remanded the cause to the Hamilton Circuit Court.

Afterward, in the latter court, appellant moved to dismiss the cause, for reasons set forth in his affidavit filed in support of the motion. The affidavit stated the granting of the change of venue from Hamilton county; that the cause was sent to the Marion Superior Court with the consent of the plaintiff, who made no objection thereto; that it had been remanded as above stated, and that the papers had been returned by order of the Marion Superior Court. The motion to dismiss was overruled.

The claimant then again moved for a change of venue from Hamilton county. The motion was granted, and the cause was thereupon transferred to the Marion Circuit Court.

Issues were then made, which were tried before the court.

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The finding was for the appellee, and judgment was rendered accordingly.

A motion for a new trial made by appellant, assigning nine causes, was overruled.

The assignment of errors contains two specifications: 1. The overruling of appellant's motion in the Hamilton Circuit Court to dismiss the cause. 2. The overruling of the motion for a new trial.

The first specification of the assignment of errors is also made the first cause in the motion for a new trial.

There was no error in the refusal to dismiss the cause. The Hamilton Circuit Court having attempted to transfer it to a court which had no authority to entertain it, with or without the consent of parties, and the papers having been properly returned, the court had jurisdiction to do what it did, and what it should have done before, to direct the transmission of the transcript and papers to a court by which the cause could be tried.

On the trial, after the defendant had closed his evidence and rested, the court, upon suggestion of counsel for the claimant, made an order requiring the claimant to testify, stating that he would not be allowed to testify except as to things strictly in rebuttal of the defence.

The second cause assigned for a new trial was that the court erred in admitting the testimony of the claimant in rebuttal.

The third and fourth causes related to the admission of the claimant's testimony as to particular facts mentioned in the motion.

The statute concerning witnesses in force at the time of the trial (Acts 1879, p. 245,) provided that in such a suit neither party should be allowed to testify as a witness "unless required by the opposite party or the court trying the cause."

The court had discretionary power to require the claimant to testify, if in the opinion of the court justice would thereby be promoted; and the discretion was an absolute one, not subject to be reviewed. *Kirchner v. Lewis' Adm'x*, 28 Ind. 499.

The objection urged in argument against particular portions

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of the claimant's testimony is, that they could not properly be called evidence in rebuttal.

The evidence admitted was evidence of a character which made it proper to be admitted in the cause, and the court regarded it as evidence of a kind to give which the witness had been required to testify. Though some portions of it may have been of a character which would have rendered it admissible as evidence in chief, as tending to establish the plaintiff's claim, we can not see that in the admission thereof there was any hinderance of justice or abuse of discretion. *State, ex rel., v. Parker*, 33 Ind. 285; *Holmes v. Hinkle*, 63 Ind. 518.

The other causes stated in the motion for a new trial were as follows:

"5. That the finding and judgment of the court herein are not sustained by sufficient evidence.

"6. That the damages as assessed by the court are excessive.

"7. For error in the assessment of the amount of recovery, the same being too large.

"8. That the finding and judgment of the court are contrary to law, the entire claim herein being completely barred by the statute of limitations, as shown by the evidence herein.

"9. That the finding and judgment of the court are contrary to law."

We will treat the words "and judgment," in the fifth, eighth and ninth specifications of causes as surplusage.

The claim was stated as for a balance due upon account, the itemized statement of the claimant's charges covering about 46 written pages of legal cap, and amounting to \$13,397.89, and his statement of credits covering about 14 pages, and amounting to \$6,065.44. There was an answer of general denial, and an answer of set-off for work and labor, goods, merchandise and materials, and money, as shown on the credit side of the account filed by the claimant, and for other matters, the whole cross claim amounting to \$11,000. The finding was general, and was for \$2,500.

It appeared from the evidence that the claimant was a son

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of the decedent, and that his claim was for his expenditures and labor in support of the decedent and his wife and minor children for a number of years, commencing in 1864.

On the 5th of August, 1872, the decedent, by proper legal proceedings, was found to be a person of unsound mind and was placed under guardianship, and on the 8th of April, 1877, he died.

This claim was filed on the 20th of December, 1878, more than twenty months after the death of the debtor.

It was not necessary for the defendant to plead the statute of limitations, in order to avail himself thereof. He could give in evidence all matters of valid defence except set-off, without special plea. *Niblack v. Goodman*, 67 Ind. 174.

Actions on accounts and contracts not in writing must be brought within six years after the cause of action has accrued. Section 210, code of 1852; section 292, R. S. 1881.

"In an action brought to recover a balance due upon a mutual, open, and current account between the parties, the cause of action shall be deemed to have accrued from the date of the last item proved in the account on either side." Section 213, code of 1852; section 295, R. S. 1881.

"If any person entitled to bring, or liable to any action, shall die before the expiration of the time limited for the action, the cause of action shall survive to or against his representatives, and may be brought at any time after the expiration of the time limited, within eighteen months after the death of such person." Section 217, code of 1852; section 298, R. S. 1881.

When death intervenes within eighteen months preceding the close of the ordinary period of limitation, the section last quoted permits the action to be brought within eighteen months after the death. *Harris v. Rice*, 66 Ind. 267.

Where the items of an account are all on one side, there being nothing on the other side except credits of payment, the account is not mutual, open and current within the meaning of the statute, and the fact that some of the items of the account are within six years does not take others of longer

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standing out of the operation of the statute. *Buntin v. Lagow*, 1 Blackf. 373; *Prenatt v. Runyon*, 12 Ind. 174.

The evidence showed but one item of the plaintiff's claim of a date later than March, 1872, and this item was for only \$13.80, being a payment made by the claimant January 30th, 1873, for clothing purchased by the decedent before the inquest of insanity, while the claimant had charge of the family, which payment had been verbally guaranteed by the claimant.

If the account was not mutual, open and current, there could be no recovery on the items as to which the statute had run at the time of the death; and on any items as to which the statute had not then run, no action could be brought after the expiration of six years from their date, unless brought within eighteen months after the death.

The credits proved consisted of work done by the decedent and money received to his use; and of goods furnished by decedent, and of work done for the claimant by decedent's wife and minor children.

One of the sons of the decedent, for some years before the inquest and the appointment of a guardian, had been working for the claimant, learning a trade under him, and he continued to work with and for the claimant after the inquest as before. A portion of the credits consisted of the work so done for the claimant by his said brother, and credits for work done and money paid by this brother continued as late as 1875, said brother being still a minor, and these were the only credits within the period of the statute.

The services of this minor son were claimed by both parties to have been rendered and received for the benefit of the decedent.

If a settlement had been made at any time, it would seem that honesty would have required that the items of the account against the claimant, allowed by him as credits and pleaded by the defendant as a set-off, should have been allowed in the settlement.

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The services of the decedent and those of his wife and minor children rendered and received for his benefit would constitute matter of set-off; and "Mutual accounts are made up of matters of set-off." Angell Lim., section 149.

By their pleadings and on the trial both parties treated the account as a mutual, open and current account.

It was competent for the court acting as a jury to find that the account was a mutual, open and current one; and if it was found to be such, the statute could only run against it from the date of the last item proved on either side. *Sanders v. Sanders*, 48 Ind. 84.

In this view, the finding was not unsupported by sufficient evidence and was not contrary to law, and we can not say that it was for too large an amount.

The judgment should be affirmed.

PER CURIAM.—It is ordered, upon the foregoing opinion, that the judgment be and it is hereby affirmed, at the costs of appellant.

ON PETITION FOR A REHEARING.

BLACK, C.—It is urged in support of a petition for a rehearing that we failed to decide what is claimed to be a question of estoppel. The evidence, to which our attention is thus again called, included a record, introduced by appellant, of an action in the Hamilton Circuit Court, brought in 1878, wherein Nathan Perrill, as administrator of the estate of George Nichols, deceased, was the plaintiff, and George Nichols, Jr., and William A. Nichols were the defendants. By the complaint, the plaintiff, as such administrator, for the purpose of making assets, sought to set aside certain deeds of conveyance of certain land in Hamilton county, being a deed executed in 1865 by said decedent and his wife to said George Nichols, Jr., and one Henry Nichols, a deed executed June 4th, 1867, by the same grantors to Henry Nichols for the same land, and a deed executed June 20th, 1867, by said Henry to said William for the same land. It was alleged, as ground

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for setting aside these deeds, that said decedent was of unsound mind when he executed those so executed by him ; that this fact was known at the time by the grantees in said deeds and by the defendants in said action ; that all the conveyances were made without any consideration, and that said Henry and William knew, when the two last mentioned deeds were executed, that there was no consideration for the same.

The defendant William alone answered by a general denial, and a trial of the issue thus formed resulted in a verdict for the plaintiff, and that the allegations of the complaint were true ; and thereupon the court adjudged that said decedent was of unsound mind and incapable of managing his estate when said deeds were executed, and that they were executed without any consideration ; and said deeds were set aside and the plaintiff's title was quieted.

On the trial of the case at bar, a witness for the appellant testified that the facts involved in this case were "substantially gone over" in said former action.

The evidence in the former case is not before us, or any part of it.

Some of the appellee's witnesses in the court below testified that in 1868 these witnesses heard the decedent and his wife say, at a time when the appellee was supporting the family, that they had no control over the farm ; that it belonged to their son William ; and that he was to maintain them as long as they lived, and that he was also to support two of their children, Martha and Milton, until they became of age ; that William was to pay them for the farm by maintaining them and said children. There was also much other testimony tending to show that the services of the appellee and his expenditures were understood by all parties to be not gratuitous. The deed of conveyance to the appellee set aside in said former action was a deed executed by said Henry.

In the case at bar, no portion of the appellee's claim was shown to have constituted a consideration for that deed or for any deed. We do not know what was claimed in the former

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suit respecting any of the matters involved in this suit, either by the appellee or by the appellant.

To constitute an estoppel, it should appear that the particular controversy in this suit was tried and determined in the former suit. The verdict and judgment in the former suit did not necessarily involve the decision of what was necessary to be decided in the present suit; they did not establish that the claimant in this action did not render the services or make the expenditures on which his claim was based, or that they were gratuitous.

If the same evidence that sustained the claim in this suit could not have established a consideration for the deeds or either of them in the former suit, it can not be said that an adjudication that there was no consideration for said deeds was an adjudication of the matter involved in this claim. A court could not have found upon the evidence in support of appellee's claim in this case that any of said deeds had for consideration the matters constituting the appellee's claim. And the appellant is as much estopped as the appellee to claim that any of said deeds had a consideration.

It is impossible for us to determine from the general verdict upon what portion of appellee's claim the court found in his favor, or how the amount of the finding was calculated.

It is insisted that the appellant did not on his part treat the services of Milton as constituting matter of set-off. There was some evidence introduced by the appellant tending to show that Milton's services paid for his maintenance.

If, as is strongly contended, it was not the purpose of the appellant either by his pleading or by his evidence to treat the account as mutual, the court, upon the whole case, was authorized to so treat it; and we must presume, in support of the action of the court, that it did so treat it.

After again carefully examining the evidence, we think the appellee's claim commends itself to a sense of justice.

PER CURIAM.—The petition for a rehearing is overruled.

The Pennsylvania Company v. Roney, Administratrix.

No. 9315.

THE PENNSYLVANIA COMPANY v. RONEY, ADMINISTRATRIX.

SUPREME COURT.—Complaint.—Unless a complaint has been attacked by a proper proceeding below or by error assigned, the Supreme Court will not consider as to its sufficiency.

SAME.—*Judgment non Obstante Veredicto.*—When there has been no motion below for judgment, notwithstanding the general verdict, no question as to the right thereto can arise in the Supreme Court.

SAME.—Instructions.—Instructions given at the request of a party can not be questioned by him in the Supreme Court.

RAILROADS.—Liability for Negligence of Fellow Servants.—A railroad company which carelessly employs incompetent servants is liable to another servant injured by such incompetency, unless it is shown that he had notice of such incompetency.

SAME.—Contributory Negligence.—An engineer of a passenger train might have jumped from his engine when he saw the danger and thus probably have avoided much danger, but to save his passengers he remained at his post and lost his life.

Held, that he was guilty of no contributory negligence which would release or lessen the employer's liability.

SAME.—The orders of a proper superior, and customary obedience thereto, inconsistent with general printed rules for his government, which have been furnished to a locomotive engineer, may be obeyed without constituting contributory negligence.

From the Superior Court of Allen County.

J. Brackinridge and J. R. Carey, for appellant.

L. M. Ninde, for appellee.

ELLIOTT, J.—Neither by the assignment of errors here, nor by any proceeding in the court below, is the complaint attacked, and, therefore, no question of its sufficiency is presented.

No motion was made in the court below for judgment notwithstanding the general verdict, and no question of the right to such a judgment can arise on appeal.

Instruction number three, which appellant criticises, was given, as the record shows, on its own motion, and it can not complain. A party who asks and secures an erroneous instruction is not in a situation to make complaint. We do not say

89	459
134	407
89	453
166	313
89	453
169	505
89	453
171	700

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that the instruction was erroneous—we decline to examine it—but if it was the appellant can not make the error available.

The only question which is presented for our consideration is whether the verdict is sustained by the evidence.

John Roney, appellee's intestate, was an engineer in appellant's employ, in charge of a fast passenger train, on its way from Chicago to Fort Wayne; the train was, for some cause not disclosed by the evidence, behind time; it was near Valparaiso at about half-past ten o'clock on the morning of March 1st, 1879, running at a rapid rate; it entered an open switch wrongfully and carelessly left open by the engineer and train men of another train; at the time Roney's engine approached the switch, he was leaning over the engine box looking ahead of him, "as," to use the language of an experienced engineer, "any other engineer would want to look coming into the yard;" the fireman, seeing the danger, jumped from the engine, but Roney stood to his post; his engine came in collision with another train standing on the switch, and he lost his life; Roney had been supplied with a book of rules, one of which required engineers to decrease the rate of speed to ten miles per hour in approaching points where other trains were to be met or passed; another rule required that the trains should be run on schedule time, but provided that if behind time the speed might be moderately increased; the train under Roney's charge had a right to the road, and it was the duty of others to keep the track clear; the time fixed by the schedule was such that the rule as to the speed of the train could not have been obeyed and the schedule time made; the principal officers of the company had frequently passed through Valparaiso, and knew that trains were habitually run at a greater rate of speed than that prescribed by the printed general rules; the condition of the switch could not have been seen as it was approached, and persons much nearer than Roney did not notice that it was open. There is evidence showing that the servants in charge of the train that had entered the switch, and whose duty it was to make it safe,

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were not competent to discharge the duties assigned them, and that the appellant did not use ordinary care in selecting them, and had notice of their incompetency.

It is contended that Roney was guilty of contributory negligence, and we shall first consider this question

We agree with counsel that the doctrine of comparative negligence is unsound. We have no doubt that the rule is that in actions to recover for injuries caused by negligence, the contributory negligence of the plaintiff will defeat the action, although it is much less in degree than that of the defendant; but to constitute contributory negligence there must not only be want of care, but such want of care must have proximately contributed to the injury.

It is the duty of an engineer to obey the rules prescribed by his employer, unless they are abrogated by the employer, or obedience is made impossible by the master's act. If an engineer wilfully or negligently disregards the rules laid down for his guidance, he can not recover for an injury received although other servants of the master may have been more negligent than he; but this result will not follow if the rules have been annulled by the master, or compliance with them rendered impossible. Where the orders given to an engineer by the governing or superior officers of the company require him to run in a different manner from that prescribed in the rules, and other trains of the class of that placed in his charge are so run with the knowledge and by direction of the governing officers, then negligence can not be imputed to the engineer although he does not follow the general rules. In this instance there was evidence fully justifying the jury in finding that the orders embodied in the schedule, in the directions of the appellant's officers, and involved in the usual practice of the company, annulled and rendered ineffective its general rules.

An engineer who remains at his post and faces danger is not to be deemed negligent. An engineer in charge of a train laden with men, women and children, is not bound to leap from

The Pennsylvania Company *v.* Rohey, Administratrix.

his engine to escape impending danger. If he believes his duty requires him to do what he can to save those under his charge, and he braves death in the discharge of that duty, the law has for him no censure, but has, on the contrary, high commendation and respect. It is no evidence of negligence that John Roney did not leap, as did his fireman, but, instead of deserting his post, went to his death in the discharge of a duty which his position cast upon him.

John Roney was not guilty of negligence in not seeing the condition of the switch. While, under the rules of the company, it was his duty to exercise great care and vigilance, he was not chargeable with negligence because he did not see what men could not have seen. It is abundantly proved that the construction of the switch and the intervening obstacles were such as to have prevented him from observing the misplacement of the rails. In addition to this he knew he was entitled to a clear track, and he had no reason to suppose that it had been made dangerous by the culpable negligence of others.

No rule of law requires that one employee, who has neither knowledge nor information putting him on enquiry, shall take notice of the competency of those employed by the common master. It is not incumbent upon one suing for injuries received from the negligence of an incompetent fellow servant to prove that he had no knowledge of such incompetency. It may be true that where a negative fact is essential to a recovery it must be proved, but such a fact as the want of capacity of fellow servants constitutes no essential ingredient of the cause of action in such a case as this.

We are well satisfied that the evidence shows that appellant's intestate was not guilty of contributory negligence.

There is evidence showing, and strongly showing, negligence on the part of appellant. That the servants whose duty it was to close the switch were negligent, there is no doubt, and that they were incompetent and ought not to have been placed in positions given them, is fairly established. It

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is firmly settled that an employer is liable to his servants for injuries caused by the negligence of co-servants in cases where the co-servants are incompetent, and ordinary care has not been exercised in selecting them. *Pierce Railroads*, 374; *Chicago, etc., R. W. Co. v. Harney*, 28 Ind. 28; *Rogers v. Overton*, 87 Ind. 410. There is evidence fairly warranting the inference that there was want of ordinary care in employing or in retaining the servants whose culpable negligence was the proximate cause of John Roney's death.

Judgment affirmed.

No. 7236.

LAKE SHORE AND MICHIGAN SOUTHERN RAILWAY COMPANY *v.* BENNETT.

89	457
132	132

89	457
162	411

89	457
165	702

COMMON CARRIER.—*Delay in Transportation.—Special Contract.—Evidence.*

Variance.—Where an action is brought against a common carrier to recover damages for an alleged delay in the transportation and delivery of live-stock, and the complaint counts upon a breach of the common law duty of such carrier, if the evidence show a special contract, which was not declared upon for the transportation of such stock, the variance is fatal and the plaintiff can not recover.

SAME.—*Delay Caused by Mob.—Insurrection and Riot.*—In such case, where the delay in transportation of stock is caused, not by the negligence or wrongful act of the carrier or its employees, but solely by the violence and riotous conduct of a lawless mob, which the carrier and the civil authorities of the State are alike unable to resist or control, the defendant is not liable for the damages resulting from such delay.

From the Noble Circuit Court.

J. B. Niles, J. I. Best and O. G. Getzendanner, for appellant.
A. A. Chapin, for appellee.

Howk, J.—In this action the appellee sued the appellant, in a complaint of two paragraphs. In the first paragraph the appellee sought to recover damages of the appellant for an alleged breach of its common-law duty, as a common carrier

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for hire, in the transportation of freight. It is very clear, however, that the special findings and judgment below in this case were not founded upon the first paragraph of the complaint, and, therefore, it need not be further noticed.

In the second paragraph of his complaint the appellee alleged, in substance, that the appellant, before and at the time of committing the grievances thereafter mentioned, was a common carrier of cattle and other live-stock, for a certain price or reward paid to the appellant, and that, on July 21st, 1877, at Kendallville station, in Noble county, Indiana, he delivered to appellant, and the appellant then and there received from him, one car-load of cattle, to wit, 16 head of cattle, of the value of \$1,600, to be carried and conveyed upon appellant's railroad in a car, from said Kendallville station to East Buffalo station, on said road, in the State of New York, without default, negligence or unreasonable delay on the appellant's part, and to be delivered at East Buffalo station without any unreasonable delay by appellant to appellee; that the distance from Kendallville station to East Buffalo station was 388 miles; that, by reason of the great distance and the nature of said property, it was necessary that a person should accompany said cattle, for the purpose of caring for and attending to them during their transit; that, for the purpose of so caring for and attending to said cattle, it was agreed by and between appellee and appellant that the appellee, without extra charge, should be carried by appellant without delay, in the train of cars in which said cattle were to be transported from Kendallville to East Buffalo, and that appellee should care for and attend to said cattle while being so transported; and to that end and purpose the appellant executed, as did also the appellee, a written contract, a copy of which was therewith filed, whereby the appellant agreed that the appellee should have the care and control of said cattle while on the appellant's grounds or in transit, and should direct and control the handling and loading and unloading of said cattle.

And the appellee averred that, in pursuance of said agree-

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ment, he entered upon said train of cars for the purpose of caring for and attending to said cattle, and was ready and willing so to do; but the appellant, not regarding its duty in that behalf, so negligently and improperly conducted itself in and about the carriage and conveyance of the appellee and his said cattle, that he and his cattle did not arrive, without unreasonable delay, at East Buffalo station; that appellant, in violation of its said agreement, while said cattle were in transit and before they had arrived at the place of delivery, at a station called Collingwood, in the State of Ohio, without any fault of the appellee and without his consent, refused to permit him to have further care and control of said cattle, and, by its agents, servants and employees, then and there assumed the sole and exclusive care and control of said cattle, for the space of eleven days, and then and there by its agents, servants and employees, carelessly, negligently and recklessly, without sufficient and safe reasons for so doing, unloaded said cattle from the cars in which they were being carried, and, by reason thereof, said cattle were bruised, lamed, strained and otherwise injured; that the appellant, by its servants and employees, then drove said cattle, with other and strange cattle, on foot a distance of twenty miles over a dusty road, and during intensely hot weather, to another station on said railroad, known as the Painesville station, and there confined appellee's cattle, with 75 head of other and strange cattle, in a cattle-pen which was not large enough to properly contain more than 32 head of cattle, and, still refusing to permit appellee to feed, water, care for and attend to his said cattle, kept them in such overcrowded condition, without any shelter from the heat of the sun and protection from the weather, in said cattle-pen with said other cattle, for the space of eleven days; that while being so driven, and while confined in said pen, said cattle were maimed, bruised and wounded by the other strange cattle and by each other, and were heated and worried, by reason of all which and by said delay the said cattle; through the neglect and carelessness of appellant's agents, servants and employees,

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became sick, sore, unsalable and greatly depreciated in condition, weight and value; and by reason thereof, and by a fall of three cents per pound in the price of cattle at said place of delivery, between the day when, by due diligence, said cattle ought to have been delivered, and the day of their actual delivery, the said cattle were worth \$490 less than they would have been, if they had been properly handled, cared for and attended to, and been delivered at East Buffalo station without unreasonable delay.

And the appellee further said that, during the time his cattle were so delayed, at appellant's request, he remained at Painesville until the appellant again loaded the cattle upon the cars, and commenced again to carry them to East Buffalo station, to wit, for eleven days; that, during that time, he expended the sum of \$25 for his board and lodging, and his time was reasonably worth the sum of \$25; that he also paid for feed and other expenses of his cattle the sum of \$75; and that he had been damaged, in the premises, in the sum of \$490. Wherefore, etc.

The cause was put at issue and tried by the court; and, at the appellant's request, the court made a special finding of the facts and of its conclusions of law thereon. The appellant excepted to the court's conclusions of law, upon the facts specially found, and filed its bill of exceptions. Its motion for a new trial having been overruled, and its exception saved to this ruling, the court rendered judgment for the appellee for his damages assessed, and costs.

In this court the appellant has assigned the following errors:

1. The circuit court erred in each of its conclusions of law upon the facts specially found;
2. The court erred in overruling appellant's demurrer to the second reply to its answer; and,
3. The court erred in overruling appellant's motion for a new trial.

The court's special finding of facts is very long; but it is

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necessary, we think, to the proper presentation of the questions to be decided, that we should give a summary, at least, of the facts specially found, and this we will do accordingly, as follows:

1. The court found that on and before July 21st, 1877, the appellant owned and operated a railroad, known as the Lake Shore and Michigan Southern Railway, extending from the city of Chicago, Illinois, to East Buffalo, New York, and passing through Kendallville, Indiana, and Collingwood, a station six miles east of the city of Cleveland, Ohio; that on and before the day named, appellant had been engaged in transporting, on its railroad, cattle and other live-stock for reward, and possessed all proper facilities for and solicited such employment.

2. On July 21st, 1877, appellee delivered to appellant, at Kendallville, sixteen steers of the value of \$1,200, to be transported from that place over said railroad to East Buffalo; which steers were delivered to and received by the appellant, under a special contract, executed by the parties at the time, of which the following is a copy:

**"Lake Shore and Michigan Southern Railway Company.
Stock Contract.**

"KENDALLVILLE STATION, July 21st, 1877.

"Memorandum of agreement made and concluded this day above named, by and between the Lake Shore and Michigan Southern Railway Company, of the first part, by their station agent at the above named station, and A. B. Bennett, of Kendallville, of the second part, witnesseth: That, whereas said railway company does not and will not assume or consent, as a common carrier, to transport live-stock, nor will it carry the same, except on the condition that the owner of the property will take care of the same while in transit, and will give careful attention to its handling: Now, therefore, in consideration that said railway company will transport, for the said party of the second part, one car load of live-stock at the special rate of forty-eight dollars per car load, the said

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party of the second part does hereby agree to take care of and look after said stock while in the cars or on the grounds of the company, or in transit, and hereby does assume all and every risk of injury which the animals or either of them may receive in consequence of any of them being wild, vicious, unruly, weak, escaping, maiming or killing themselves or each other, or from delays, or in consequence of heat, suffocation, or the ill effects of being crowded upon the cars of said railway company, or on account of being injured by the burning of hay, straw or any other materials used by the owner for feeding the stock or otherwise, and for any damage occasioned thereby; and also all risks of any loss or damage which may be sustained by reason of any delay, or from any other cause or thing in or incident to, or from or in, the loading or unloading said stock. It being understood that, previous to loading, the owners agree to examine for themselves the cars, and in order to guard against accidents that may happen in consequence of insecurity (if any there be) in the floor, frame or doors of the cars, the owners of the stock undertake to point out to the agent of the company any perceptible defect in such cars, to be repaired.

"And it is further agreed, that the said party of the second part is to load and unload said stock at his own risk, the said railway company furnishing the necessary laborers to assist, under the direction and control of said party of the second part, who will examine for himself all the means used in the loading and unloading, to see that they are of sufficient strength, of the right kind, and in good repair and order. And it is further agreed between the parties hereto, that each and every of the persons, riding free to take care and charge of said stock, do so at their own risk of personal injury from whatever cause; and that said party of the second part, for the consideration aforesaid, hereby release and agree to hold harmless, and keep indemnified, the said party of the first part of and from all damages, actions, claims and suits on account of any and every the injuries, loss and damages

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hereinbefore referred to, if any such occur or happen. This company will not be responsible for any loss or damage to the property after the same shall have been delivered to any connecting railroad, or other carrier, on the route to the point to which it is consigned; and all liability for any cause shall cease when said property shall be so delivered to a connecting line. And it is expressly agreed, that the railway company shall not, under any circumstances, nor from any cause, be held liable beyond the sum of \$200 for injury to or loss of any single animal carried pursuant to this agreement, although its actual value may exceed that amount, unless its valuation and special accommodations for it, at a distinct rate, shall be stipulated in this agreement. And this agreement further witnesseth, that the said party of the second part has this day delivered to said company one car load of cattle to be transported to East Buffalo, on the conditions, stipulations, and the understandings above expressed."

This contract was executed by the appellant's station agent at Kendallville, and by said A. B. Bennett, and was dated July 21st, 1877.

3. The usual running time in the transportation of cattle by appellant from Kendallville to East Buffalo was thirty-three hours. On the evening of July 21st, 1877, the appellee's cattle, accompanied by him for the purpose of caring for them, were started in appellant's train of cars for East Buffalo station, and were carried with reasonable diligence and care until they arrived, about two o'clock p. m., of July, 22d, 1877, at Collingwood station, about six miles east of Cleveland, Ohio, on the Erie division of said railroad. The train of cars upon which appellee's cattle were being carried stopped as usual at Collingwood for the purpose of changing engines and train hands; but the train did not leave there, as it ordinarily did, and proceed on its way to East Buffalo. The train remained on the track where it stopped, at Collingwood, until four o'clock p. m. of the next day, and appellee's cattle were without food and water. In the mean time there ar-

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rived at Collingwood many trains of cars, loaded with cattle, sheep and hogs, of which 160 cars were loaded with cattle, all going eastward on appellant's railroad. For reasons hereinafter stated, on the evening of July 23d, 1877, the appellee's cattle and all the other cattle, sheep and hogs, then on appellant's cars at Collingwood, were unloaded by appellant from the cars, as they stood on the track of its road, by jumping the cattle out of the cars to the ground, a distance of about four feet, thereby injuring them. After appellee's cattle and the other cattle were so unloaded, they were driven to Painesville, a station about twenty miles east of Collingwood on appellant's railroad, where there were cattle-yards in which they could be herded, watered and fed, there being no cattle-yards at Collingwood. The cattle had been without water for about thirty hours, and were very thirsty, and in passing streams of water between Collingwood and Painesville they drank to excess and were thereby injured. On July 24th, 1877, the cattle arrived at Painesville, and were placed by appellant in the cattle-yards and fed and watered. Appellee's cattle were placed with 75 head of strange cattle in a cattle-yard much too small for so many cattle, and appellant placed locks on the gates and fastened the cattle in, and they were there confined for eleven days, without shelter and exposed to the heat of the sun. Appellee's cattle were of the Durham breed, and very docile and tame, and, by reason of the crowded condition of the yard, they were hooked, gored and jaded by the other cattle, and were greatly depreciated in weight and value. In about eleven days after their arrival at Collingwood, appellee's cattle were again placed on appellant's cars at Painesville and transported to East Buffalo, the place of their original destination.

4. When appellee's cattle arrived at Collingwood, on July 22d, 1877, appellant was willing to carry the cattle in said car eastward to East Buffalo, and had the proper cars and engines to perform its contract, but it was prevented from proceeding and completing, in the usual time, the carriage of the cattle

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to their place of destination. A few weeks prior to the arrival of said cattle at Collingwood, appellant had made an order reducing the wages of its employees on its trains, at its stations and shops, ten per cent.; and nearly all the brakemen and firemen in its employ refused to perform their work, or to permit others to perform their work on appellant's trains, or to move its trains as it wished to do. Nearly all the appellant's firemen and brakemen, who had not been discharged by appellant, with other lawless persons, took forcible possession of all the engines and their fixtures, and the round-house, and placed the engines therein and barricaded the same, detached all the hose of the engines, uncoupled the cars and hid the coupling-pins, and, with great force, took full and complete possession of all of the appellant's property at Collingwood station. The persons, who took such forcible possession of appellant's property, boldly and defiantly refused to obey all orders of appellant's officers, and refused to permit any of its trains to be moved by any persons whatever, and openly threatened the lives of any person's who should attempt to move said trains, or obey the appellant's officers in relation to the movement of its trains or cars, unless the wages of the employees should be restored as they were before their reduction. Appellant's officers made several attempts to move its trains from Collingwood, and placed thereon employees who were faithful to appellant; but they were prevented by personal violence from moving said trains, and, to save their lives, they were compelled to desist from all efforts to move the appellant's trains. The resistance to the commands of appellant's officers, in the movement of its trains, was composed of a lawless assembly of persons and assumed the character of a mob, of a very alarming appearance and dangerous for appellant to oppose, and could not be opposed and overcome without strong military power. The threatened violence was so great that appellant was powerless to resist or overcome it, and the authorities of the State of Ohio failed and,

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for a considerable time, were unable to suppress it. The forcible resistance to the movement of appellant's trains commenced, and the lawless assemblage of persons met, at almost the time of arrival of the train with appellee's cattle at Collingwood, on July 22d, 1877, and continued for eleven days, and until said cattle were re-shipped at Painesville, as before stated. During all the time, from the day the cattle arrived at Collingwood until they were reshipped at Painesville, the appellant's officers exerted themselves to move said trains, and did all that could be done to induce the persons, who had been in appellant's employ, to desist from their unlawful and riotous conduct, and permit appellant to use and control its own property ; but they refused so to do, except on condition that the order for the reduction of their wages should be annulled and their wages restored to the former rate. If appellant had rescinded its order reducing wages ten per cent., and restored the wages as they were before the reduction, the court found that its employees would have resumed their work and have ceased all force and violence to its officers and faithful servants, and have restored to appellant the possession and control of its property and railroad ; but it refused so to do, and the resistance continued during all said time. On account of such forcible resistance and the unlawful seizure of its engines and property, appellant was prevented from moving its trains and proceeding with appellee's cattle.

5. Appellant had a round-house at Collingwood, where it kept many locomotives and usually changed the engines used in moving its freight trains ; but it did not unload, feed or water cattle there, and had no facilities for so doing.

6. Strikes and riots were occurring, about the same time, on other railroads in the United States, and had resulted, at some places, in the destruction of much railroad and other property ; and the general belief was that all the persons who took forcible possession of railroad property in defiance of lawful authority were acting under and controlled by the

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orders of a secret body, enforced by violence and regardless of the laws of the land.

7. Appellant's officers, during said time, had cause to fear and did fear a great destruction of property by the persons who had so forcibly and unlawfully taken possession of appellant's railroad and other property; and they acted cautiously and prudently with the rioters, so as not to provoke the destruction of property.

8. Appellant's officers were unable to move their trains eastward and carry appellee's cattle to East Buffalo, or to any other place where they could be cared for, fed and watered, on account of such violence, although they had a sufficient number of employees who were ready and willing to move the train, with appellee's cattle, to East Buffalo, but were prevented on account of such violence from so doing. The appellant's officers took exclusive control of the cattle in unloading them, and kept such control until they were reloaded on the cars at Painesville. The best that could be done to preserve the cattle was to drive them to Painesville, where they could be fed and watered; and, on account of the large number of cattle so stopped and delayed at Collingwood, it was impracticable for the several owners thereof to unload and drive them separately to Painesville. Considering the great number of cattle on the cars at Collingwood, and their suffering condition, and the urgent necessity for prompt action to save them from perishing, it was necessary and proper that the cattle should be handled as they were by appellant, and driven to Painesville, and, as they were thirsty, their drinking to excess and the consequent injury could not be avoided.

9. Said mob would have been disbanded and all violent opposition would have ceased if appellant had consented to restore the reduction of wages, and to retain the striking employees in its service, but it refused to restore said reduction.

10. There was a sufficient number of competent men ready and willing to take the places of the strikers, at the reduced

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wages, at any time, except for the violent opposition of the rioters and the fear of mob violence.

11. The first day at Painesville, the supply of water for the cattle was not sufficient, but this deficiency was promptly remedied; but the crowded condition of the cattle in the yards was not corrected, because it was reasonably supposed that the riot would cease, and that appellant would be able to carry the cattle to their destination without further delay, and that it would be unnecessary to enlarge the yards, or to cover the same to protect the cattle from the heat of the sun.

12. After eleven days from July 22d, 1877, the strike and riot ceased, and appellant's employees resumed work on its cars, and it was restored to the possession of all its property and railroad; and as soon as the riot ceased appellant shipped appellee's cattle to East Buffalo. If it had not been for appellant's employees, who had been such up to the commencement of the strike or riot, and who had not, during its continuance, been discharged by appellant, and who, at the expiration of the strike or riot, resumed their places as appellant's servants, the appellant could have overcome said resistance and carried appellee's cattle in due and ordinary time, and that the delay occurred by reason of the acts of appellant's employees. But, on account of the apprehension of danger and the overpowering violence of the mob, it was not reasonably prudent or practicable to discharge the strikers during the continuance of the riot.

13. Appellee was with his cattle from the time they were shipped at Kendallville until they arrived at East Buffalo; and he went with them from Collingwood to Painesville, at appellant's request, and under its promise to pay him for his services and all his expenses, as appellant's servant. His time was reasonably worth \$22, and his expenses were \$15 during the delay, and keeping his cattle in the yards at Painesville amounted to \$40, which he paid and which had not been repaid to him. On account of the bruises and jaded condition of the cattle, and their injuries received as aforesaid, they

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were largely depreciated in value, and were worth \$433.50 less than they would have been if they had been carried to East Buffalo in ordinary time, and had not been bruised and otherwise injured. The appellee was not guilty of any negligence on his part.

Upon the foregoing facts, the court's conclusions of law were that appellee should recover of the appellant the sum of \$40, paid by him for feed of his cattle at Painesville, and \$22 for his services to appellant, and \$15 for his expenses, and said sum of \$433.50 for his damages, making an aggregate sum of \$480.50, for which, and for his costs of suit, the appellee was entitled to judgment. The court also found, as a conclusion of law, that the appellant was not relieved by the acts of the rioters from its liability to appellee for the delay in transporting his cattle to East Buffalo, or for the injuries to his cattle.

In the outset of this opinion, it was said to be clear that the special findings of facts in this case were not founded upon the first paragraph of appellee's complaint. The reason for this statement is now obvious. In the first paragraph of his complaint the appellee counted exclusively upon an implied contract or agreement of the appellant, as a common carrier, and sought to recover damages for an alleged breach of its common-law duty as such carrier in the transportation of his cattle. No reference whatever is made in this first paragraph to any special or written contract between the parties for the carriage and delivery of appellee's cattle. When, therefore, the court found, as it did, that appellee's cattle were delivered to and received by the appellant under a special contract, which was at the time duly executed by the parties, it would seem that such finding would be an end of the case, as stated in the first paragraph of the complaint, and that no recovery could be had thereon. Especially so, when it was agreed in such special contract that the appellant "does not and will not assume or consent, as a common carrier, to transport live-stock." In the face of this stipulation or limitation, agreed to expressly by the appellee, he can not, as it seems to us,

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maintain his action against the appellant, as a common carrier, for any alleged breach of its common-law duty as such carrier in the transportation of his cattle. We are clearly of the opinion, therefore, that the facts specially found by the court do not, in any particular, sustain or support the averments of the first paragraph of appellee's complaint, and that there can be no recovery thereon.

We have given a full summary of the allegations of the second paragraph of the complaint, and it will be seen therefrom that the appellee has not declared therein upon the written contract between the parties, nor sought to recover damages for an alleged breach by the appellant of the stipulations of such contract. On the contrary, in this second paragraph, as in the first, he has sued the appellant, as a common carrier of cattle for hire, for an alleged breach of its common-law duty as such carrier, in the transportation of his cattle. The only substantial difference between the two paragraphs is the reference made to the written contract in the second paragraph, in substance, as follows.

"And the plaintiff further says that the distance from Kendallville station aforesaid to East Buffalo station is 388 miles, and by reason of the great distance and the nature of said property it was necessary that a person should accompany said cattle for the purpose of caring for and attending to them during the transit, and, for the purpose of so caring for and attending to said cattle during the transit as aforesaid, it was agreed by and between plaintiff and defendant, that plaintiff, without extra charge, should be carried by defendant without delay in the train of cars in which said cattle were to be transported from Kendallville aforesaid, to East Buffalo aforesaid; and that plaintiff should attend to and care for said cattle while being transported as aforesaid; and to that end and purpose the defendant executed, as did also the plaintiff, a contract in writing, a copy of which is filed herewith, whereby the defendant agreed and promised that plaintiff should have the care of said cattle while on the grounds of

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the defendant, and while in transit, and should direct and control the handling and loading and unloading the same."

It is manifest, we think, that, by this mere reference to the written contract, the appellee did not intend to, as he did not in fact, declare upon such contract. In the second paragraph of his complaint, he did not allege that the appellant had contracted in writing with him for the transportation of his cattle, nor did he allege that the appellant had failed to perform the stipulations of such contract, on its part to be performed. The court found, as a fact, that the appellee's cattle were delivered to and received by the appellant, under a special written contract executed by the parties at the time; in which contract it was expressly recited that the appellant did not and would not assume or consent to transport live-stock as a common carrier. It was not competent for the appellee, as it seems to us, to ignore the written contract assented to and accepted by him for the transportation of his cattle, and to attempt, in direct contravention of the provisions of such contract, to hold the appellant liable in damages as a common carrier, for an alleged breach of its common-law duty as such carrier, in the transportation of his cattle. We are of the opinion that the case made by the court's special findings of fact is an entirely different case from the one stated by the appellee, in either of the paragraphs of his complaint. The appellee could only recover, if he recovered at all, upon and in accordance with the allegations of his complaint; and as the facts specially found by the court present an entirely different case from that stated by the appellee, in either paragraph of his complaint, we think that the court, as a conclusion of law upon its findings of fact, ought to have found for the appellant, the defendant below. *Indianapolis, etc., R. R. Co. v. Remmy*, 13 Ind. 518; *Excelsior Draining Co. v. Brown*, 38 Ind. 384, 388; *Jeffersonville, etc., R. R. Co. v. Worland*, 50 Ind. 339.

The court erred, as it seems to us, in its conclusions of law upon the special findings of fact, for another reason. The

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fourth and eighth special findings of the court, the substance of which we have heretofore given, bring the case at bar fairly within the doctrine laid down by this court in *Pittsburgh, etc., R. W. Co. v. Hollowell*, 65 Ind. 188 (32 Am. R. 63). In the case cited, the court said: "In cases like the present, for delay in receiving and carrying the goods, the carrier is not an insurer, and is bound only by the general rule of liability for a breach of his contract, or of his public duty as a carrier, and may be excused for delay in receiving the goods, or in transporting them after they have been received, whenever the delay is necessarily caused by unforeseen disaster which human prudence can not provide against, or by accident not caused by the negligence of the carrier, or by thieves and robbers, or an uncontrollable mob." And again, the court said: "The fact that a railroad company has reduced the wages of its employees can not be held to justify or excuse a mob, composed of indiscriminate persons, in stopping a train of cars, and delaying the receiving of goods, or the transportation of freights; nor can the railroad company be held responsible for the consequences of such unlawful proceedings, when they cause such delay."

The judgment is reversed, at the appellee's costs, and the cause is remanded with instructions to set aside the conclusions of law, and to enter as a conclusion, upon the special findings of fact, a finding for the appellant, the defendant below, and to render judgment accordingly.

Woods, J., dissents.

ON PETITION FOR A REHEARING.

HAMMOND, J.—The petition for a rehearing having been overruled, the appellee has filed his petition, supported by a very earnest argument, asking that the order overruling his application for a rehearing be vacated.

We have re-examined the record and carefully compared it with the foregoing opinion, and find that the opinion contains a correct statement of the record. There can be no difference,

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practically, whether the appellee bases his claim for recovery upon the appellant's liability as a common carrier or upon the express contract set out in the special findings of the court, as, in our opinion, such special findings of fact show that the appellant was not liable upon either ground. The appellee's loss resulted from causes over which the appellant had no control; and against which no care or prudence could have provided; and the special findings show that the appellee's property had all the care and attention that, under the circumstances, an ordinarily careful man would have bestowed upon his own property.

Without deciding whether, in any event, the appellee's present motion should be entertained, we are of the opinion that it should be overruled, for the reason that the conclusion reached by this court in its former opinion was correct.

Motion overruled.

89 473
124 406

No. 9165.

DALE ET AL. v. THE TRAVELLERS INSURANCE COMPANY.

REAL ESTATE.—Action to Recover.—Description.—A description of real estate which furnishes a starting point and gives the boundary line by admeasurement is not void for uncertainty, though the monuments given are not fixed, and the distance between certain points is given as so many feet, more or less, as in such case the monuments may be disregarded and the phrase "more or less" treated as surplusage.

SAME.—A statement, following such description, that the land described is the same acquired from "S., excepting a tract 25 feet wide by 65½ feet long, conveyed to I." does not show that any portion was excepted from the description given, but shows that all the land described, except the lot named, was acquired from S., and does not render the description given indefinite.

From the White Circuit Court.

D. D. Dale, S. A. Huff and D. Turpie, for appellants.

A. W. Reynolds and E. B. Sellers, for appellee.

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BEST, C.—This action was brought by the appellee against the appellants, to recover the possession of some real estate. A demurrer to the first paragraph of the complaint was overruled, and this ruling raises a single question, and that is, whether the description of the land, contained in the complaint, is void for uncertainty.

The description is as follows: “The following real estate, in White county, Indiana: Beginning at the southwest corner of a lot situated on the east side of Main street, in the town of Monticello, formerly owned by Richard Imes, Jr., and running thence south one hundred and fifty feet, more or less, to a thirty-foot street, granted by John Shideler, along the cut of the Toledo, Logansport and Burlington Railroad; thence with said street east three hundred feet, more or less, to the west line of the lot once owned by William B. Keefer; thence north two hundred and eighty-six feet, more or less, to the alley on the south line of land formerly owned by James C. Reynolds; thence west one hundred feet, more or less, to the northeast corner of a lot formerly owned by the heirs of John Warrick, deceased; thence south one hundred and sixteen feet to the southeast corner of said Imes lot; thence west two hundred feet, more or less, to the place of beginning, being the same property acquired by said Dale by deed from John Shideler, dated April 29th, 1865, and recorded in said county in deed record No. 18, page 470.”

This description is not, as we think, void for uncertainty. It is true that the location of the various lots mentioned in the description as monuments is not made certain by averments, and the description itself does not fix their locality. It is equally true that the sheriff who must execute the judgment of the court has no power to ascertain the locality of these various monuments, but must identify the property from description given. *Lewis v. Owen*, 64 Ind. 446.

The description, however, as we think, sufficiently describes the property, aside from these unknown monuments. It

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furnishes a starting point and gives the boundary line by ad-measurement. The length of each line is given, it is true, as so many feet, more or less, but the phrase "more or less" may, in the absence of known monuments, be disregarded, and will not render the distance given uncertain. Washburn on Real Property, 4th ed., vol. 3, p. 407, sec. 41, thus states the law: "If, however, the boundary line is described by admeasurement, it will govern, if there are no known monuments by which to test its accuracy, although the distance be described as so many feet, 'more or less.'" See also authorities there cited.

As the sheriff has no power to ascertain the locality of these lots they may be regarded as unknown monuments, and as the phrase "more or less" does not render the distance given uncertain, these portions of the description may be disregarded without affecting its sufficiency. The starting point as given, without the aid of the next point reached, is uncertain, but the latter renders the first fixed and definite. The starting point is at the southwest corner of a lot on the east side of Main street, in Monticello. The "east side" means the margin or edge of the street, and the first point reached is on the north side of a street thirty feet wide, running east and west along the line of the Toledo, Logansport and Burlington Railroad, one hundred and fifty feet south of the starting point. The starting point is on the east side of Main street, in Monticello, one hundred and fifty feet north of a street thirty feet wide, running east and west along the line of the Toledo, Logansport and Bloomington Railroad. This point is definite. From this point the boundary line runs one hundred and fifty feet south to said street; thence east along said street three hundred feet; thence north two hundred and eighty feet; thence west one hundred feet; thence south one hundred and sixteen feet; thence west two hundred feet, to the place of beginning. If the last line given runs two hundred feet due west it would reach a point twenty feet north of the starting point; but as the starting point is the place to be reached,

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this point controls both the course and distance given, and said line runs from said point one hundred and sixteen feet south of the north line directly to the starting point. *Rosenbaum v. Schmidt*, 54 Ind. 231; 3 Washb. Real Prop. 407. This, in our opinion, was a sufficient description.

We can not say that the parcel intended to be recovered was correctly described, but think a parcel was definitely described.

The demurrer was properly overruled, and the judgment should be affirmed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment be, and it is hereby in all things affirmed, at the appellants' costs.

ON PETITION FOR A REHEARING.

BEST, C.—The appellants strenuously insist that the description contained in the first paragraph of the complaint is void for uncertainty. They maintain that a portion of the tract described was excepted from the general description given, and, as such excepted portion was not described, it was impossible to determine what land the appellee sought to recover. If any portion of the land described was excepted without a description of such portion, there would be much force in this position, but we are of opinion that the description given does not warrant this construction. After the words "to the place of beginning," which was the conclusion of the description, these words follow, "being the same property acquired by said Dale by deed from John Shideler, dated April 29th, 1865, and recorded in said county in deed record No. 18, page 470, excepting a tract 25 feet wide by 65½ feet long, conveyed to Imes, situate east of and adjoining the said Warwick lot." This language does not show that any portion was excepted from the description given, but simply shows that the land described, except the lot named, is the same that Dale acquired from Shideler. Its purpose was to render the description given more definite, and while it could not subserve any such purpose, we think it did not render the

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description less definite. After again examining the question presented, we are of opinion that the description given is not void for uncertainty, and therefore think that the petition should be overruled.

PER CURIAM.—The petition for a rehearing is overruled.

No. 10,997.

SCOTT, ADMINISTRATOR, v. DAILEY ET AL.

DECEDENTS' ESTATES.—*Claims.—Practice.—Statute Construed.*—Two days after a claim was filed against an estate, it was brought to trial over the objection of the administrator.

Held, that, under the statute, Acts 1883, p. 155, section 7, this was error.

SAME.—Liability for Attorney's Services.—An attorney employed by residuary legatees, performing services beneficial to the estate, can not maintain a claim against the estate therefor. It is otherwise where the employment is by the administrator.

From the Marion Circuit Court.

F. Rand and J. M. Winters, for appellant.

E. F. Ritter, L. Ritter, W. D. Bynum and A. T. Beck, for appellees.

HAMMOND, J.—On May 29th, 1883, the appellees, composing the law firm of Dailey & Pickerill, filed their petition in the court below, asking an allowance to be paid out of the estate of the appellant's testate for services rendered by the appellees as attorneys at the request of residuary legatees of the deceased. Two days after filing their petition, the appellees moved its submission, but the appellant objected on the ground that the claim had not been filed against the estate in the manner, nor for the length of time, that then authorized its trial. This objection was overruled and the appellant excepted. The appellant then demurred to the petition, as not stating facts sufficient, etc., and because of a defect of parties defendants. The demur \grave{e} r was overruled, and to this ruling the appellant excepted. The appellant an-

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swered by the general denial. There was a trial by the court, and a finding for the appellees in the sum of \$600, and, over the appellant's objection, an order was made directing payment out of the assets of the decedent's estate. The appellant's motion for a new trial was overruled and an exception reserved. The several rulings of the court referred to above, are embraced in the assignment of errors in this court. The evidence is in the record.

The facts, material to be considered, as alleged in the appellees' petition or appearing from the evidence, are as follows: The testate, at the time of his death, was the financially responsible member of the firm of Farman & Pierce, contractors, who at that time were building the court-house, in Tippecanoe county, under a contract with the board of commissioners of that county. This contract was believed to be highly prejudicial to the decedent's estate. The appellant, as administrator of the estate, acting under the authority of an order of the court, effected a compromise with the board of commissioners of Tippecanoe county, whereby, in consideration of an agreed sum of money, paid by the administrator to that county, the estate of the decedent was released from further liability on said contract. In bringing about this compromise and settlement, the appellees, under an employment from the residuary legatees of the testate, performed services worth, at least, the amount for which they obtained the allowance from which this appeal was taken. The services so rendered were not performed by virtue of any contract with the appellant, nor at his instance or request.

An executor or administrator may, when proper to do so, employ an attorney in the management of the estate, and in such case he is personally liable for the payment of his fees, unless there is a special agreement that the attorney shall look to the estate alone for their payment. But the attorney so employed may, if his services are not paid for by the executor or administrator, apply to the court for an allowance by filing his claim against the estate. *Long v. Rodman*, 58 Ind. 58.

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It is the duty of the court to make an allowance to the executor or administrator for reasonable attorney fees where he employs an attorney in the management of the estate. R. S. 1881, section 2396. If an executor or administrator refuse to pay an attorney employed by him in the interest of the estate, the attorney may, as other claimants, file his account against the estate, under section 86 of the decedents' act, as amended by section 5, Acts 1883, p. 153. This section applies to claims against estates originating after as well as before the death of the decedent. Claims filed against estates, and not admitted by the executor or administrator, can not be tried, without his consent, until the provisions of section 95 of the decedents' act, as amended by section 7 of the act of 1883 (Acts 1883, p. 155,) have been complied with. This section requires that a claim against an estate shall be filed and placed on the appearance docket of the court ten days before the first day of a term, and if not admitted by the executor or administrator before the last day of such term, it shall be transferred to the issue docket for trial at the following term. The appellees did not comply with this statute.

Neither heirs nor legatees have power, by contract with an attorney, to bind an estate, represented by an executor or administrator, for the payment of attorney fees, however beneficial the services engaged may be for the estate. In such case the attorney can look only to his employers for compensation.

The judgment of the court below is reversed, at the appellees' costs.

No. 10,040.

WISEMAN ET AL. v. WISEMAN.

MARRIAGE.—Presumption.—Evidence.—A marriage will, in the absence of countervailing evidence, be presumed to exist so long as both parties live; and evidence that the husband afterwards, in a remote place, for a long period, cohabited with another woman, and had children by her,

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and that during all that time she was recognized as his wife, has no tendency to prove a dissolution of the original marriage, and is not admissible for that purpose.

SAME.—Divorce.—The oral statement of a husband or wife that they have been divorced is not sufficient evidence thereof; nor will a separation, however protracted, be sufficient to create the presumption of a divorce.

PRACTICE.—Open and Close.—The mere fact that the counsel in opening the argument to the jury fails to read or comment on some instructions which the court has decided to give, and then does so in his closing argument, will not enable the Supreme Court to say that it was error to refuse a further speech to opposing counsel.

From the Hamilton Circuit Court.

D. Moss, A. F. Shirts, G. Shirts and W. R. Fertig, for appellants.

T. J. Kane and T. P. Davis, for appellee.

NIBLACK, C. J.—This was a petition for partition by the appellee, Sarah Wiseman, claiming to be the widow of John Wiseman, deceased, against the appellants, John W. Wiseman, Jacob A. Wiseman, Hiram T. Wiseman, Elizabeth M. Cupp, John B. Cupp and Elizabeth Wiseman, devisees under the last will of the decedent.

This is the second appeal of the cause to this court. See *Wiseman v. Wiseman*, 73 Ind. 112. Answer in general denial. Verdict for the plaintiff, finding that she was the owner of one undivided third part of the several tracts of land described in the complaint, and that the defendants were the owners of the two remaining third parts, accompanied by answers to several special interrogatories submitted to the jury which were entirely consistent with the general verdict.

Motion for a new trial overruled. Partition ordered and commissioners appointed. Partition afterwards reported and report confirmed.

Upon causes assigned for a new trial questions were made upon the evidence, upon instructions given as well as refused, and upon the right to close the argument, and we are required by this appeal to review the several questions thus made below.

At the trial the defendants disputed the plaintiff's claim that

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she was the lawful widow of John Wiseman, the decedent, and that constituted the principal and controlling question in the cause.

No one testified to being present at the marriage of the plaintiff to the decedent, but it was proven by admissions of the decedent soon afterwards made, and by circumstances which presumably left no reasonable doubt in the minds of the jury, that these parties were regularly married in the State of Maryland in March, 1828; that they soon afterwards went to housekeeping in that State, and lived together as husband and wife until September, 1829; that in February, 1829, a daughter was born to them who is still living; that differences having arisen, and having continued to exist for some time, between them, they separated in September, 1829, and she returned with her child to her father's house in the State of Pennsylvania; that early in January, 1830, the decedent visited the plaintiff at her father's house, and with the consent of her father entered into an agreement for a permanent separation; that on the 9th day of that month the plaintiff and decedent on the one part, and the plaintiff's father on the other, executed and acknowledged an instrument in writing, in which the plaintiff and decedent were mutually described as husband and wife, providing for such separation and conveying to the father certain property for the use of the plaintiff. It was further made to appear that the decedent thereupon returned to the State of Maryland; that four or five years afterwards he left the State of Maryland and came to this State, settling upon a farm in Hamilton county; that when he came to this State he was accompanied by another woman, known ever afterwards as Elizabeth Wiseman, and one of the defendants in this action herein above named, with whom he resided as his wife until his death in 1876, and who, in the mean time, became the mother of her co-defendants, except John B. Cupp, also recognized as his children; that in his will the decedent described the said Elizabeth, and pro-

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vided for her, as his wife; that, during the period of their residence in this State, the said Elizabeth was generally reputed and understood to be the wife of the decedent, but there was no evidence tending to show that they were ever actually married. These facts concerning the decedent's relations to, and cohabitation with, the said Elizabeth, were brought out in a rather fragmentary and incidental way, mainly through testimony offered by the plaintiff. When the defendants proceeded with their evidence, they called one Henry P. Crull as a witness, but, some objection being made to questions addressed to him, their attorneys submitted a proposition as follows:

"We offer to prove by Mr. Crull, the witness on the stand, that the decedent, John Wiseman, resided in this county with the defendant Elizabeth Wiseman from about 1835 until the time of his death, in 1876; that the other defendants, except Elizabeth Wiseman, are the children of the said John Wiseman by said Elizabeth Wiseman; that the said John Wiseman and Elizabeth Wiseman were recognized in this county during all the time they resided here as husband and wife, and that she lived and was recognized as his wife during all that period of time; and that the children named were their children and recognized by him as legitimate. We further offer to prove by records and deeds that the said Elizabeth Wiseman joined with the said John Wiseman in the conveyance of his real estate, styling herself as his wife."

This proposition was rejected by the court, and the witness was not permitted to testify as proposed.

It is insisted that the proffered evidence would have tended to raise the presumption that the marriage relations between the plaintiff and decedent had been in some manner dissolved, and that it was for that reason erroneously excluded. If the plaintiff had relied upon reputation and cohabitation alone to establish her alleged marriage with the decedent, the evidence offered would have been relevant and probably admissible as establishing a condition of things apparently inconsistent

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with her claim of widowhood, but, standing by itself, it would not have properly tended to prove the dissolution of the marital relations shown to have once existed between the plaintiff and the decedent.

'When the marriage relation is once entered into, it is presumed to continue until the death of one of the contracting parties, and this presumption can only be overcome by affirmative proof that the marriage contract has been lawfully dissolved. Presumptions can not, therefore, be indulged against the continuance of a marriage contract.

Furthermore, all the substantial matters proposed to be proven by the defendants were, as above set forth, otherwise brought out and presented to the jury, so that in any event no serious injury was inflicted by the rejection of Crull's testimony.

The court instructed the jury that "the mere admission or oral statements of a husband or wife, that he or she was or had been divorced, would not be sufficient of itself to establish the fact that the marriage relations had been dissolved;" also, that "no length of separation of husband and wife will create any presumption of itself that the parties are divorced." No argument is submitted against the correctness of these instructions, and, as applicable to the facts of this case, we see no objection to either one of them.

References are made to other instructions, both given and refused, but in such a general way as to raise no specific question for decision upon any of them.

So far as we have observed, no ruling was made either in giving or refusing instructions, of which the defendants had any just cause of complaint.

Before the argument commenced the court, at the request of the parties, announced what instructions would be given and which ones asked would be refused. In his opening address to the jury, counsel for the plaintiff did not either read or comment upon certain instructions prayed for on behalf of the plaintiff and decided to be given by the court. Neither

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did counsel for the defendants who followed him. In his closing argument, however, counsel for the plaintiff did read and comment upon some of the instructions requested for the plaintiff and approved by the court as above stated. When he concluded, counsel for the defendants claimed the right of replying to him and of closing the argument, but the court declined to permit any further reply on the part of the defendants and declared the argument closed.

In referring to trials before a jury, section 536, R. S. 1881, provides that "The parties may either submit or argue the case to the jury. In the argument, the party having the burden of the issue shall have the opening and closing, but shall disclose in the opening all the points relied on in the cause; and if, in the closing, he refer to any new point or fact not disclosed in the opening, the adverse party shall have the right of replying thereto, which reply shall close the argument in the case."

The bill of exceptions does not state either the nature or the extent of the comments made by counsel for the plaintiff on the instructions read by him in his closing argument, or anything from which we can infer that any new point or fact was referred to by him while commenting upon those instructions. For aught that appears counsel for the plaintiff may have pursued the same general line of argument in closing that he adopted in his opening address to the jury.

As, in the absence of an affirmative showing to the contrary, all the presumptions go in favor of the regularity of the proceedings appealed from, we must assume that no new point or fact was referred to in the closing argument for the plaintiff.

Painful as, for obvious reasons, our conclusion may be to the appellants, we feel constrained to hold that no sufficient cause has been shown for a reversal of the judgment.

The judgment is affirmed, with costs.

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No. 9939.

PFEIFFER ET AL. v. CRANE, GUARDIAN.

89	485
169	209
169	211

89	485
171	26

GUARDIAN AND WARD.—Settlement.—Appeal to Supreme Court.—Until a guardian has finally settled and been discharged, so that he has nothing more to do as guardian, an appeal will not lie from an order of the court concerning the settlement of the guardianship.

From the Jackson Circuit Court.

W. Dixon and T. C. Woodburn, for appellants.

B. H. Burrell, F. Emerson and A. P. Charles, for appellee.

BICKNELL, C. C.—Allen S. Crane was the guardian of Mary A. Crane and James H. Crane. James H. Crane died intestate and unmarried, in November, 1876, leaving said Mary A. Crane and one Clara B. Haney his sole heirs.

Mary A. Crane, in May, 1880, intermarried with Matthew Pfeiffer, an adult, she being then and now a minor. At the September term, 1881, of the Jackson Circuit Court, said guardian filed in said court his separate final settlement reports in the estate of each of said wards.

In his report in the estate of said Mary A. Pfeiffer he stated that he had repeatedly offered to settle with her and her husband, and had been unable to make settlement with them.

On the 27th of May, 1881, said Mary A. Pfeiffer and her husband appeared in court and filed a written motion, stating that since said marriage they had demanded of said guardian "an accounting and settlement with themselves of the said guardianship, which he had failed and refused to make," and claiming that said reports be dismissed and rejected. This motion was sworn to by said Matthew Pfeiffer. It was overruled by the court.

The ward and her husband then filed exceptions to said reports, and propounded interrogatories to the guardian, which he answered under oath. They then requested the court to make a special finding upon the exceptions, and stated that

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they did so with a view of excepting to the decision of the court upon the questions of law involved.

At the November term, 1881, the exceptors requested the court to make a special finding of the facts and state the conclusions of law thereon, and this the court did, sustaining some of the exceptions and overruling others.

The record then states as follows: "To which findings of fact and conclusions of law the exceptors at the time except." They also moved for a new trial, and this motion was overruled. The court then made the following order:

"And it is ordered by the court that the reports of Allen S. Crane, as guardian of Mary A. Pfeiffer and James H. Crane, be rejected, and approval thereof is refused, and said guardian is directed to make and file his report in accordance with the special findings herein." To this order the exceptors at the time excepted.

Their bill of exceptions No. 1 states that the court made the following findings and conclusions of law, to wit: (here insert), "to which findings and conclusions of law numbers 6, 7, 8, 9, E, F, G, H, J and K, the said exceptors at the time excepted." The reasons alleged for the motion for a new trial were as follows:

1. Error of the court in the conclusions of law numbers 2, 3, 4, 8, A, B, C and D, for the reasons that the assessments of the amount of recovery in favor of exceptors are too small.
2. That the findings of fact in the finding and decision of the court are not sustained by sufficient evidence.
3. That the conclusions of law made by the court, in its finding or decision, are all contrary to law.
4. That the findings of fact found by the court in the decision are contrary to law and evidence.
5. On account of errors of law occurring at the trial and excepted to by exceptors at the time.

The order of the court, rejecting the reports of the guardian and directing him to make a further report, was appealed from by the ward and her husband.

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The general bill of exceptions containing the evidence describes that order as "the judgment heretofore set out in the record, and the special finding of facts and of law heretofore set out in the record," and states that the exceptors prayed an appeal therefrom, which was granted.

The appellants assign the following errors:

1. The court erred in overruling the appellants' motion to dismiss the report of said appellee in the estate of said ward, Mary A. Pfeiffer, and in the estate of said ward, James H. Crane, deceased.
2. The court erred in its conclusions of law, "E," "F," "J," and "8."
3. The court erred in overruling the motion for a new trial.

The appellee moves to dismiss the appeal, because "no final order, decree or judgment was made by the circuit court, from which an appeal would lie."

As a general rule, appeals may be taken from the circuit court to the Supreme Court from all final judgments. R. S. 1881, section 632.

The distinction is between final judgments and interlocutory judgments. A final judgment is the ultimate determination of the court upon the whole matter in controversy in the action. An order of the court, made in the progress of the cause, requiring something to be done or observed, but not determining the controversy, is an interlocutory order, and is sometimes called an interlocutory judgment. Powell Appellate Proceedings, 51.

From these interlocutory orders appeals can be taken in four cases only.

1. Where the order is for the payment of money, or to compel the execution of any instrument of writing, or the delivery or assignment of any securities, evidences of debt, documents, or things in action.
2. Where the order is for the delivery of the possession of real property, or for the sale thereof.
3. Where the order grants or dissolves, or overrules a mo-

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tion to dissolve, an injunction in term, or grants an injunction in vacation.

4. Where the order is made upon a writ of *habeas corpus* either in term or vacation. R. S. 1881, section 646, which is the same as section 576 of the code of 1852.

The order appealed from in this case is not one of any of the foregoing cases. Therefore, if it is an interlocutory order, the appeal will not lie and ought to be dismissed. It does not make a final disposition of the guardianship. It would seem, therefore, not to be a final judgment. It substantially rejects a guardian's report, and directs him to make another report. It would seem, therefore, to be an order made in the progress of the cause, not determining the controversy, and, therefore, interlocutory.

The appellant claims that it is in the nature of a final judgment; he says it determines the rights of the parties, at least as to those parts of the report which were held to be right. But so it might be said that an interlocutory decree for the partition of lands determines the interests of the parties and orders the land to be divided according to such interests; yet it has always been held that an appeal will not lie from such an interlocutory order, because it is not one of those mentioned in the statute. *Rennick v. Chandler*, 59 Ind. 354.

In the case of *Thiebaud v. Dufour*, 57 Ind. 598, a trustee of an express trust under a will had made a report to the circuit court; there were exceptions to the report, and the court made the following order: "And said report, together with said exceptions, being submitted to the court, and evidence heard, the court refused to approve said report, to which refusal the said trustee excepts, and sixty days' time is given to file a bill of exceptions." The trustee appealed. This court said: "This is not a final judgment. It is a mere interlocutory order, from which no appeal will lie." The only difference between this case and the case at bar is that in the former the trustee appeals, in the latter the *cestui que trust* appeals.

In *Wood v. Wood*, 51 Ind. 141, an order had been made for distribution of the surplus of a decedent's estate, and after-

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wards, on a petition filed for that purpose, judgment was rendered that said order of distribution be set aside and held for nought, and from this judgment an appeal was taken. This court held that it was not a final judgment, and that an appeal would not lie.

In *Goodwin v. Goodwin*, 48 Ind. 584, it was held that there could be no appeal from a partial settlement of an executor or administrator, and that such settlements are not conclusive, but are only *prima facie* correct, and on final settlement may be opened up so as to correct mistakes therein, although not excepted to at the time. There is no reason why the same rule should not apply to partial settlements of guardians.

In the case of *Angevine v. Ward*, 66 Ind. 460, the guardian submitted to the court what purported to be his final report. The administrator filed exceptions to said report; the reports were approved and the exceptions of the administrator were not sustained, and the court made an order to that effect, but did not discharge the guardian. The administrator appealed, and claimed that the order operated as a final settlement, but the court said: "We are of the opinion that it was not in any proper sense an order of final settlement of the guardianship, and that it did not, in legal effect, discharge the appellee from such guardianship. By its terms, further duties in regard to his trust were devolved upon the appellee."

The administrator's appeal was dismissed because the order appealed from was not a final judgment, but was an interlocutory judgment, and was not one of the orders mentioned in section 576 of the code of 1852, which is the same as section 646 of the R. S. of 1881. For the same reason, and under the authority of the cases hereinbefore cited, the present appeal should be dismissed.

PER CURIAM.—It is therefore ordered, on the foregoing opinion, that the appeal in this cause be and the same is hereby dismissed, at the costs of the appellants.

Original opinion filed at the November term, 1882.

Opinion on petition overruled at the May term, 1883.

Nowlin *et al.* v. Whipple.

ON PETITION FOR A REHEARING.

BICKNELL, C. C.—The controversy in this case arose upon the separate reports of the guardian of the estates of each of his wards, Mary A. Crane and James H. Crane. Mary A. Crane had married Matthew Pfeiffer, and James H. Crane had died, leaving Mary A. Crane his sole heir.

The court made an order that both reports be rejected and approval thereof refused, and that the guardian report further. From this order Pfeiffer and wife appealed.

It was held in *Angevine v. Ward*, 66 Ind. 460, that, to authorize an appeal from the final settlement of a guardian, such settlement must fully discharge the guardian, and leave nothing to be done by him in his fiduciary capacity. In the present case the order appealed from leaves the guardianship open and under the control of the court, and requires the guardian to report further. The case just cited and the other cases referred to in the principal opinion show conclusively that an appeal will not lie from such an order. The petition for a rehearing should be overruled.

PER CURIAM.—The petition is overruled.

No. 10,328.

NOWLIN ET AL. v. WHIPPLE.

SUPREME COURT.—Briefs.—A brief which merely states questions, without discussing them, does not bring any question before the Supreme Court. **SAME.—Instructions.**—Written instructions given do not become part of the record without a bill of exceptions, where the only signature thereto is that of counsel to exceptions on the margin. R. S. 1881, sections 533—535.

From the Dearborn Circuit Court.

F. Adkinson and A. W. Gaines, for appellants.

O. B. Liddell, W. H. Dowdell and J. A. Wilson, for appellee.

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FRANKLIN, C.—The errors assigned in this case are the overruling of the demurrer to the second paragraph of the answer and the overruling of the motion for a new trial.

There is no sufficient brief by appellant on file to present any question for consideration. There is a supersedeas brief, containing a statement of the facts, the pleadings, the rulings of the court and the assignment of errors, but it points out no objections, contains no argument and cites no authorities. This does not meet the requirements of a submission brief.

The record was filed in this court July 6th, 1882; the supersedeas brief was filed at the same time, containing the following statement: "These points we propose to discuss at length in a brief to be filed when this cause is submitted."

Appellee filed a brief August 29th, 1882, and on his motion the cause was submitted November 28th, 1882. On the 19th day of January, 1883, appellants filed a paper containing the following statement: "We submit this cause upon the brief heretofore filed on behalf of the appellants, without further argument, reserving the right to cite authorities and to file an answer to the brief of the appellee before the papers in this cause shall be distributed."

Five months have elapsed since, and no additional brief containing objections, arguments or authorities, has been filed by appellants. Perhaps the reserved rights in this respect have been exhausted. But, notwithstanding the want of a proper brief by appellants, we have examined the second paragraph of the answer, and, in the absence of any objection being pointed out, we have been unable to discover any that requires it to be held bad on demurrer. There was no error in overruling the demurrer to it.

The giving of instructions to the jury and the refusal to give others are the only questions stated in the supersedeas brief arising under the overruling of the motion for a new trial. The evidence is not in the record. Four paragraphs of writing are copied in the record as the instructions given. The record states that these instructions were asked to be

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given by the defendant, but the record does not show that they were given. There is a marginal note signed by plaintiffs' counsel to each paragraph, stating, "Given and excepted to." These paragraphs are not signed by the judge. There is no bill of exceptions in the case. The record does not show that these paragraphs, as instructions, were ever given to the jury, or filed in the case, or ordered to be made a part of the record by the court. The record does not contain any instructions asked and refused to be given, nor show what instructions were given.

No question is properly presented by the record upon the motion for a new trial. What little record there is in the case appears to show that the whole cause and appeal is without merit, and that no good could result from further delays for appellants' brief. The judgment ought to be affirmed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment of the court below be and it is in all things affirmed, with costs.

No. 9770.

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89	498
137	40
89	492
138	391
139	68

DEED.—*Estoppel.*—A deed of real estate, with covenants of warranty, will, as a rule, estop the vendor from asserting an after-acquired title against his vendee or those claiming under him, but where such a deed simply purports to convey the right, title and interest of the vendor, it will not be such an estoppel.

SAME.—*Covenant of Warranty.—Estoppel.—Vendor and Vendee.*—A general covenant of warranty, contained in a deed by which A., B. and W. convey two separate parcels of land in the northeast quarter of a certain section, is not limited to the interest that W. may have in the first described parcel by the following clause, inserted near the close of said deed, viz.: "And it is the express intention hereby to convey the entire interest of the said Micajah W. White in and to the said northeast quarter of said section," and said W. is thereafter estopped, by the execution of such deed, from asserting an after-acquired title to such land as against his vendee, or those claiming through him.

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SAME.—Action to Recover Real Estate.—Answer.—In an action by W. and others to recover such parcel of land from the assignee of the vendee, an answer setting up such conveyance in bar of the action upon the part of W. was sufficient, and the court erred in sustaining a demurrer to it.

From the Superior Court of Marion county.

N. B. Taylor, F. Rand, E. Taylor, J. A. Holman and J. Brownlee, for appellant.

A. T. Beck and J. A. Buchanan, for appellees.

BEST, C.—This action was brought by Micajah W. White, Thomas J. White, Francis M. White and Emily Rook, formerly White, against the appellant to obtain partition of $55\frac{17}{100}$ acres of land, particularly described, being a part of the northeast quarter of section 31, township 16, range 5 east, in Marion county.

The complaint alleged that John White died intestate in 1855, seized of the northeast quarter of said section, and that he left surviving him his widow, Mahala, and six children, viz.: Micajah W., Thomas J., Francis M., Emily, George and Benjamin; that afterwards George and Benjamin died intestate, and without issue; that thereafter said Mahala intermarried with Isaac Heron, and in a proceeding for partition the $55\frac{17}{100}$ acres of land above mentioned were set off to her and her husband; that said parcel embraced the one-third of said quarter which she held as widow, and one-ninth which she held as heir of her deceased children; that thereafter said Mahala and her husband conveyed said land to one Joseph K. Sharpe, who conveyed the same to appellant; that subsequently said Mahala obtained a divorce from said Heron, and afterwards, without making any other disposition of said land, died intestate, leaving the appellees as her only children and heirs at law, by reason whereof they aver that they own the undivided three-fourths of said parcel as tenants in common with appellant, and demand partition.

The appellant filed an answer of several paragraphs. The first was a general denial. No question arises upon the second. The third was limited to the interest of Micajah W.,

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and alleged that he had joined his mother and her husband in conveying the property by a warranty deed, and was estopped to claim any interest in it. The fourth alleged a ratification of the conveyance by the mother after she had obtained a divorce from her husband.

A demurrer was sustained to the third, and a reply in denial of the fourth paragraph of the answer was filed. The issues were submitted to a jury, and a verdict was returned for the appellees. A motion for a new trial was overruled, and final judgment was rendered upon the verdict.

The questions discussed upon this appeal arise upon the order of the court in sustaining the demurrer to the third paragraph of the answer, and in overruling the motion for a new trial. The first only will be considered.

The sufficiency of the third paragraph of the answer depends upon a construction of the deed, a copy of which accompanies the paragraph. If this deed only conveyed the interest that Micajah W. had in the land at the time of the conveyance, the appellant concedes that the paragraph was insufficient; but he contends that it was not limited to such interest. The language of the deed is that "Isaac Heron and Mahala Heron, his wife, and Micajah W. White * * * convey and warrant to Joseph K. Sharpe * * * * the following real estate in Marion county, in the State of Indiana, to wit:" Here follows a description of the land in dispute, after which the deed proceeds thus: "being the same premises set apart to the said Isaac Heron and Mahala Heron, his wife, in the partition of the estate of John White, deceased. Also, the following described tract:" Here follows a description of $26\frac{8}{100}$ acres of land in the same quarter, after which the deed proceeds thus: "This last described tract being the same premises set apart to Micajah W. White on the partition of the estate of John White, deceased, and it is the express intention hereby to convey the entire interest of the said Micajah W. White in and to the said northeast quarter of said section."

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It is well settled that a deed of a certain parcel of land, with covenant of warranty, will, as a general rule, estop the vendor from asserting an after-acquired title against his vendee or those claiming under him.

It is also well settled, that where a deed, with covenant of warranty, simply purports to convey the right, title and interest of the vendor in land, such deed will not estop the vendor from asserting an after-acquired title. *Shumaker v. Johnson*, 35 Ind, 33; *Miller v. Ewing*, 6 Cush. 34; *Blanchard v. Brooks*, 12 Pick. 47; *White v. Brocaw*, 14 Ohio St. 339; Rawle Covenants, p. 394.

The language of this deed, aside from the last clause, is broad enough to convey the land in question and to estop Micajah W. White from asserting an after-acquired title against his vendee or those claiming through him. This is conceded; but it is insisted that the last clause limits the general language which precedes it, and that the deed, as a whole, properly construed, simply purports to convey such interest as he then had in the land. If so, the covenant only applies to the interest conveyed, and will not estop him from asserting an after-acquired title. *Allen v. Holton*, 20 Pick. 458; *Hope v. Stone*, 10 Minn. 141.

Whether the deed purports to convey the parcel, or only purports to convey his interest in the parcel, is the question upon which the sufficiency of this paragraph of the answer depends. The language in the granting part of this deed, as before stated, purports to convey the parcel, and unless the last clause limits the language employed, the deed must receive such construction. The last clause does not purport to limit the language employed in the conveyance of this parcel. The statement is that it is the express intention to convey his entire interest in the quarter section. This indicates an intention to convey any interest he may have had in the quarter section, aside from the parcels described. If such was not the intention, the residue of the quarter would not probably have

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been mentioned, and the statement would have been limited to the parcels described. The fact that such statement would not operate to convey such interest, if any, does not negative such intention, nor does it render the statement applicable alone to the parcels described. The language employed does not apply to them other than as a part of the quarter. This is not, however, enough. Effect must be given to the language of the entire deed, and to thus construe it would be, in effect, to destroy the covenants inserted in it. If, after their insertion, it had been intended to limit the estate conveyed, this should have been clearly expressed. Had the statement been that it was the intention only to convey his interest in the quarter, or to convey his entire interest in the parcels described, the intention to limit the preceding language would have been apparent. The statement, however, is quite different, and can not, as we think, receive such construction. The covenants in this deed must have been inserted for some purpose, and thus to construe the deed is practically to destroy the covenants and to render the deed, in effect, merely a quitclaim as to title. This was not the intention of the parties —at least it does not so appear. It may be said that it is apparent from the deed that Mahala Heron and her husband owned the land in dispute, and that Micajah W. owned the other parcel, and as they joined in the deed conveying both, the deed should be construed as a conveyance alone of his interest in his mother's parcel. The fact assumed does not appear, and if it did it would not warrant such construction. The language is the same as to both parcels, and if the deed should thus be construed as to one parcel, it should as to both. This construction would render it a mere quitclaim as to the parcel owned by Micajah W., and would not estop him from asserting an after-acquired title to such parcel. This was not the intention of the parties, and the deed can not receive such construction. In addition to this, the law requires the court, in construing the language of a grant, to give it a construction most favorable to the grantee, and one which will

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sustain rather than defeat a covenant plainly expressed in the deed. This rule forbids the construction insisted upon by the appellees. For these reasons we think the court erred in sustaining the demurrer to the third paragraph of the answer, and for such error the judgment must be reversed. This conclusion renders it unnecessary to consider certain questions discussed under the motion for a new trial.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment be and it is hereby in all things reversed, at the appellees' costs, with instructions to overrule the demurrer to the third paragraph of the answer.

No. 8946.

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WARRING v. HILL.

PARTNERSHIP.—*Dissolution.*—*Contract.*—Where, on dissolution of a partnership, all matters between the partners are settled, one of them agreeing to pay an outstanding note of the firm, which he fails to do, and the other is compelled by suit to pay it, the latter may recover the amount from the former.

SAME.—*Agreement.*—Partners may sue each other for breach of an express agreement made between them, e. g., as where, upon a consideration, one fails to pay a partnership debt which he had agreed to pay, and the other is compelled to pay it.

CONTRIBUTION.—One of two joint debtors, who is compelled to pay the whole debt, may maintain a suit against the other for contribution.

STATUTE OF LIMITATIONS.—*Set-Off.*—A set-off is not barred by the statute of limitations, though the full time had elapsed when the plaintiff's cause of action accrued. R. S. 1881, section 367.

JUDGMENT.—*Service of Process.*—*Presumption.*—*Jurisdiction.*—The presumption that there was service of process, which attaches to the silent record of a judgment of a court of general superior jurisdiction, is rebuttable, and when rebutted by evidence the judgment is avoided.

COUNTER-CLAIM.—*Process.*—A defendant seeking relief against a co-defendant should file a counter-claim, and bring the co-defendant in by service of process unless he appears.

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CONTRACT.—*Voluntary Services.*—For voluntary services, without an express promise to pay, or circumstances from which the law implies a promise, there can be no recovery.

PROMISSORY NOTE.—*Payable in Bank.*—*Payment.*—*Presumption.*—A promissory note given and received as payment discharges a debt; nor is there any legal presumption that a note so given was not payable in bank.

From the Monroe Circuit Court.

J. W. Buskirk and H. C. Duncan, for appellant.

G. W. Friedley and H. H. Friedley, for appellee.

ELLIOTT, J.—The first paragraph of the appellee's complaint alleges that the parties to this action were partners; that as such they executed their promissory note to one John Lucas; that the money derived from the note went into the business of the partnership; that afterwards the partnership was dissolved by mutual agreement, and that, in the language of the complaint, "they, as such partners, had a full settlement of all partnership business between themselves, including said note given to said Lucas, at which time the plaintiff paid to the defendant his full share of said partnership indebtedness evidenced by said note;" that Lucas afterwards obtained a judgment thereon which appellee was compelled to pay.

Where one partner pays his full share of the partnership indebtedness to his co-partner, and is afterwards compelled to pay a claim of one of the creditors, he has a right of action against the co-partner. The partner who receives money or property with which to pay all partnership debts becomes bound to discharge them, and if he fails, and thus compels his partner to pay the debt, the latter has a complete right of action. One who receives value from another, in consideration of the payment by him of a debt for which they are jointly liable, is impliedly bound for the payment of the debt. It is not a voluntary payment for one jointly liable with another to pay a judgment rendered against them for the debt for which they are so liable. A creditor may enforce his claim against both debtors, and is in no wise affected by an agreement to which he was not a party, and from this it fol-

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lows that appellee simply paid a debt from which he could not escape.

The second paragraph is the same as the first, except that it avers an express promise to pay the note executed to Lucas, and is unquestionably good. The third paragraph charges that the parties became liable as joint makers on the note executed to Lucas, and that appellee was compelled to pay the whole debt. We have no doubt of the sufficiency of this paragraph. One of two joint makers, who is compelled to discharge the entire joint debt, may compel contribution from the other.

It is undoubtedly the general rule that one partner can not sue another upon a claim growing out of the partnership business, but that the action must be for an accounting, or for the balance found due upon an adjustment of the partnership affairs. *Crossley v. Taylor*, 83 Ind. 337; *Meredith v. Ewing*, 85 Ind. 410. But there are exceptions to this general rule. *Lawrence v. Clark*, 9 Dana, 257 (35 Am. Dec. 133); *Snyder v. Baber*, 74 Ind. 47. Where separate and distinct liabilities are created by the express agreement of the parties, the general rule does not apply. *Foster v. Allanson*, 2 T. R. 479; *Wright v. Hunter*, 1 East, 20. In illustration of this principle may be cited the case of *Neil v. Greenleaf*, 26 Ohio St. 567, where it was held that an action may be maintained by one partner against another who had taken certain portions of the partnership property and agreed to pay a designated debt of the partnership, and had failed to do so. The case of *Wells v. Carpenter*, 65 Ill. 447, also supplies an illustration. It was there held that on a sale by one partner to another, and a promise by the latter to pay back the amount invested by the former, an action would lie without showing an accounting. For other examples of the application of the principle stated we refer to *Wright v. Eastman*, 44 Maine, 220; *Bartley v. Williams*, 66 Pa. St. 329; *Warbritton v. Cameron*, 10 Ind. 302. The logical deduction from the propositions stated is, that an action may be maintained upon the express promise of one partner to pay

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a partnership debt where a valuable consideration moves to the promisor. Tested by this rule the fourth instruction given by the court was right.

Where there is an express promise to pay a designated partnership debt, an action on that promise may, no doubt, be defended on the ground that the promisor was compelled to pay more than his share of partnership liabilities. This, however, is matter of defence, and the plaintiff in such an action is not bound to anticipate defences, but does all that is required of him when he shows a valid promise and its breach.

A set-off is not barred by the statute of limitations. Under our law there is no bar, although the full statutory period had elapsed at the time the debt sued on accrued. *Fox v. Barker*, 14 Ind. 309; *Livingood v. Livingood*, 6 Blackf. 268; *Armstrong v. Caesar*, 72 Ind. 280. It was, therefore, not an error of which appellant can complain for the court to instruct the jury that "a set-off is never barred unless barred at the time the debt it is pleaded against arose or accrued to the holder," although one of which appellee might justly complain.

The general rule is that where the record of an action in a court of general superior jurisdiction is silent, the presumption is that process was issued and served. Where, however, it is made to appear, as it was in this case, that there was, in truth, no service of process, the judgment may be avoided.

A party brought into court upon a complaint on a promissory note signed by himself and another, as partners, is in court only as to the cause of action set forth in the complaint. If his co-defendant desires to secure a judgment against him, there must be a cross complaint and service of process, unless, indeed, there is a voluntary appearance.

It is an elementary rule that no one can be held to pay for services or property unless there is an express or implied promise. One can not voluntarily render services for another and afterwards compel payment. There must be a request, and either an express agreement to pay or circumstances from which a promise can be implied.

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It is settled law that a promissory note executed as payment and accepted as payment discharges an existing debt as fully as if paid in money. This rule is explicitly stated in the eighth instruction, and it was not necessary for the court to repeat it.

There is no general presumption that a note executed in payment of a debt was not payable in bank. Whether a note was or was not payable in bank, is a question to be decided by the facts of the particular case, and can not be disposed of upon any general legal presumption, for there is in such a case no presumption one way or the other.

Judgment affirmed.

No. 7598.

PRATHER ET AL. v. THE WESTERN UNION TELEGRAPH COMPANY ET AL.

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89	501
154	228

RAILROAD COMPANY.—Special Charter.—Width of Right of Way.—Estate Appropriated.—Construction of Railroad.—Telegraph Poles.—The Jeffersonville Railroad Company was originally incorporated, under the name of "The Ohio and Indianapolis Railroad Company," by an act approved January 20th, 1846 (Local Laws 1846, p. 153). In section 14 of this act the company was "invested with all the rights and powers necessary for the construction and repair of a railroad from the town of Jeffersonville, near the falls of the Ohio, to the town of Columbus, in the county of Bartholomew, *not exceeding sixty feet wide*, with as many set of tracks as the president and directors may deem necessary." By an act approved January 15th, 1849, the corporate name of the company was changed to "The Jeffersonville Railroad Company," and for the purpose of constructing its road, with all desirable appendages, the company was "authorized to enter upon, take, and hold *in fee simple* all real estate and materials necessary for that purpose." Under its charter and the amendments thereof, the railroad company entered upon and took the plaintiffs' real estate and thereon constructed its line of railroad, in and before June, 1851, without any conveyance or gift thereof to the company, and without any claim or proceeding instituted by the owner of the land for the assessment of his damages. It does not appear that, at the time

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of its appropriation of the plaintiffs' land, the company limited the width of such appropriation to a less width than sixty feet as allowed by its charter. Upon the foregoing facts—

Held, that by its entry upon, and the construction of its road over and across, the lands of the plaintiffs' ancestor, the railroad company appropriated, took and held such lands, in fee simple, to the full width allowed, namely, "sixty feet wide."

Held, also, that it is competent for the railroad company, within the limits of such appropriation, to erect itself, or by contract with another company, such telegraph poles as are or may be necessary to the proper maintenance of a line of telegraph along the line of its railroad.

From the Bartholomew Circuit Court.

F. T. Hord, for appellants.

S. Stansifer, T. A. Hendricks, C. Baker, A. W. Hendricks and O. B. Hord, for appellees.

Howk, J.—This case is now before this court for the second time. When it was first here, the opinion and judgment of this court are reported under the name of *Prather v. The Jeffersonville, Madison and Indianapolis Railroad Company et al.*, 52 Ind. 16.

The action was commenced by Reason W. Prather, as sole plaintiff, against the Western Union Telegraph Company, Martin Egan, John Brisbin, Horace Scott, Dillard Ricketts, and The Jeffersonville, Madison and Indianapolis Railroad Company as defendants. In his complaint the said plaintiff alleged, in substance, that he was the owner in fee simple of certain real estate, particularly described, in Bartholomew county, Indiana; that, on the — day of —, 1870, the said defendants, without right and wrongfully and unlawfully, entered upon the plaintiff's said real estate, and then and there, without right, chopped down and destroyed twelve growing trees theron, for the purpose of clearing the way for planting telegraph poles and placing wires thereon to be used by said defendants for telegraphing purposes; and then and there dug large holes in said land, and placed therein about two hundred telegraph poles across the entire length of said land, for the purpose of acquiring a proprietary interest and ease-

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ment in said land for telegraphing uses; that the said plaintiff then and there removed the said poles from his said land, and the defendants then and there put them back in his land, and he then and there removed said poles from his land seven different times, and as often as removed the defendants then and there followed and replaced them, until finally they set their poles in plaintiff's land and placed their wires thereon, for telegraphing purposes, in defiance of the plaintiff and over his objections; that prior thereto the said defendants never assessed, or caused to be assessed and tendered, nor had they since assessed or tendered, his damages for said attempted usurpation of his lands, and they threatened to replace said poles and wires as often as the same might be removed, and to continue said poles and wires thereon for the purpose of acquiring an easement in his land, and they also threatened to annoy and vex the plaintiff with criminal prosecutions if he should remove said poles and wires, so unlawfully placed on his land; that said poles and wires interrupted the plaintiff in the cultivation of his said lands, and his ingress and egress to and from the same, and the different parts thereof, and interfered with and prevented his comfortable enjoyment of his said lands; and that the continuation of said poles on his lands might and would create a multiplicity of suits, and continued and repeated litigation. Wherefore the plaintiff demanded judgment for \$1,000, and that the defendants might be enjoined from continuing their poles on and their wires over the plaintiff's said lands, or to abate them and enjoin any future erection thereof, and for all proper relief.

After the cause was remanded from this court to the court below, the death of the plaintiff, Reason W. Prather, was suggested, and upon the supplemental complaint of the appellants, as the heirs at law and personal representatives of said decedent, and on their motion and with the agreement of the defendants, the court ordered that the action should thereafter proceed and continue, by and in the names of the appellants, as the plaintiffs therein. Thereupon the appellees, the defend-

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ants below, with leave of the court, withdrew their answers theretofore filed, and then filed a new and substituted answer in four paragraphs. To each of these paragraphs of answer the appellants demurred upon the ground that it did not state facts sufficient to constitute a defence to their action. These demurrers were severally overruled by the court, and to each of these rulings the appellants excepted. They failed and refused to reply to said answer, and the court rendered judgment against them, that they take nothing by their suit, and for the appellees' costs.

Errors are assigned by the appellants in this court, which call in question the several decisions of the circuit court in overruling their demurrers, for the want of sufficient facts, to each of the paragraphs of the appellees' answer.

In their argument of this cause in this court, the counsel on both sides, and especially the appellants' counsel, have discussed together all the questions arising under each of the alleged errors. In considering these questions, and in determining the sufficiency of each of the paragraphs of the appellees' answer, we shall, to some extent at least, in this opinion, follow the arguments of counsel and decide together, as far as we can, the several questions presented in regard to the sufficiency or insufficiency of the facts stated, in each of the paragraphs of the appellees' answer, to constitute a defence to the appellants' action. We deem it necessary, therefore, to the proper presentation and decision of these questions, that we should first give the substance, at least, of the facts alleged by the appellees in each of the paragraphs of their answer, which we now do accordingly.

In the first paragraph of their answer the appellees, the defendants below, jointly answered as follows: "1st. That The Jeffersonville Railroad Company was a corporation duly created and chartered by the Legislature of the State of Indiana, by an act approved January 20th, 1846, entitled 'An act to incorporate The Ohio and Indianapolis Railroad Company,' and the several acts amendatory thereof and supplemental

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thereto, and by said charter and amendments was authorized to construct and operate a railroad from the city of Jeffersonville, Indiana, to the city of Indianapolis, Indiana, through and into the counties of Clark, Scott, Jackson, Bartholomew, Johnson and Marion; and in the month of June, 1851, the said railroad company, having previously located its road upon, over and through the said land of the plaintiff in the complaint mentioned, did, pursuant to the powers conferred upon it by its said charter and amendments thereto, for the purpose of constructing its said road with all desirable appendages, and for putting and keeping the same in repair, and for doing all proper business thereon, enter upon and take in fee simple a portion of said land, to wit, a strip thereof upon, over and through the same sixty feet in width, being thirty feet on each side of the center line of its track across said land, doing no unnecessary damage; that immediately thereafter said railroad company proceeded to construct and did construct its road upon said right of way in the center thereof, and continuously since said railroad company and its successors hereinafter mentioned have possessed and held in fee simple the said land so taken and appropriated.

"Defendants aver that neither said Reason W. Prather nor said plaintiff did, within two years from the time of such entry and appropriation, nor at any time since, file a claim for damages on account of such entry and appropriation, or select an appraiser or take any proceedings whatever for the assessment, appraisal, or ascertainment of damages, if any, by reason of said entry and appropriation of said land.

"And defendants further aver that all the said supposed trespasses in the complaint mentioned were done in and upon the said land so taken and appropriated, and *not elsewhere*.

"And said railroad was constructed from said Jeffersonville to the town of Edinburg, in Johnson county, equipped and operated by said Jeffersonville Railroad Company, until the — day of April, 1866, when said corporation and the Indianapolis and Madison Railroad Company, a corporation created

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as aforesaid, and owning and operating a railroad from Madison, Indiana, through said Edinburg to said Indianapolis, by proper articles of consolidation, consolidated and became one corporation, by the name of the defendant, The Jeffersonville, Madison and Indianapolis Railroad Company, whereby the said last named corporation became and was and is the owner of all the property, rights and franchises of said two corporations, including said road and the right of way thereof over the real estate herein mentioned.

"The defendants further aver that, in order to insure safety and despatch in the transaction of its business, said last named railroad company has, ever since the year 1869, used the telegraph, having telegraph offices at all the various stations of said roads along the lines thereof, whereby the business of the road is greatly facilitated and the interests of the travelling and shipping public greatly subserved, and the trains thereon are and have been all the time run by telegraph, which is essential to secure the proper speed and safety of trains. In order to secure such telegraph facilities the said last named railroad company, on the — day of November, 1869, entered into an agreement with the defendant, the said telegraph company, which is still in force, whereby, in consideration that said railroad company would furnish the right of way for telegraph poles and lines along said railroads, over the right of way of said railroad company, said telegraph company would construct and keep in repair telegraph lines along said roads, and furnish one telegraph wire for the exclusive use of said railroad company, and, in pursuance of said agreement, said telegraph company constructed telegraph lines along the whole length of said roads over and upon the right of way of said railroad company, and furnished one wire for the use of said railroad company, which has been and is used for the purpose aforesaid.

"And it was in the construction and repairs of said telegraph line over the real estate described in the complaint, that the acts complained of were done, the defendants, other than said

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two corporations, acting as the agents of said telegraph company, to do and perform said work, and not otherwise, and no act was done or performed other than was necessary to clear the way for and erect and maintain said telegraph line on said real estate, which was located and constructed where it still remains, on the right of way of said railroad company, at a distance of twenty-nine feet from the center of said railroad track ; and defendants aver that said telegraph poles were planted at said distance from said railroad track by the order and direction of said railroad company, in order, as it was necessary so to do, to prevent the obstruction of said road, and the damage and accidents incident thereto by the falling or the blowing down of said poles by winds and storms, the poles being of a length that if thrown in the direction of the track they will not reach the same."

The second paragraph of the appellees' answer contains, substantially, the same general allegations of facts as are set forth and contained in the first paragraph thereof, *except* the allegations in regard to the acquisition, taking or appropriation, by the Jeffersonville Railroad Company, of the right of way for its line of railroad. These allegations of fact, in the second paragraph of answer, were as follows : "That after its organization said railroad company, by its proper officers, determined to acquire, for the purposes of its said road, a right of way of the width of sixty feet, upon which to construct and operate its said road ; that it did accordingly proceed to acquire from the respective owners of the lands to be traversed by its said road, either by agreement and voluntary grant or by legal appropriation, pursuant to the powers vested in it by its said charter and amendments, a right of way sixty feet wide, for the purposes aforesaid ; that the same was and is necessary to the convenient and successful use and operation of said road ; that said road was so constructed with said width of way (except through towns and cities) from the city of Jeffersonville, Indiana, to the city of Edinburg, Indiana, through the counties of Clark, Scott, Jackson, Bartholomew and John-

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son; that in, to wit, the month of June, 1851, the said railroad, in the course of the construction of its said road between the said city of Jeffersonville and the city of Columbus in said Bartholomew county, having previously located the route of its said road upon, over and through the said lands in the complaint mentioned, the same being then owned by the plaintiffs' ancestor, said Reason W. Prather, did, pursuant to the powers conferred upon it by its said charter and amendments, for the purpose of constructing its said road with all desirable appendages, and for putting and keeping the same in repair, and for doing all proper business thereon, and for the purpose and with the intent of taking and appropriating, pursuant to said charter and amendments, a right of way in fee simple for said road upon, over and through said lands, of said width of sixty feet, enter upon and take and appropriate in fee simple such right of way upon, over and through said lands, and thereupon did build and construct its said railroad upon the center line thereof, and that it and its said successor company has, continuously since that time, possessed, maintained and used said railroad so located and built, and upon the same line and place, and that continuously since that time it has possessed said right of way under claim of exclusive right thereto."

In the third paragraph of their answer the appellees alleged in substance the same general facts in regard to the incorporation of the Jeffersonville Railroad Company, the location and construction of its line of railroad from Jeffersonville to Edinburg, passing through and over the land of said Reason W. Prather, in the complaint mentioned, and the subsequent consolidation of that company with the Indianapolis and Madison Railroad Company, thus constituting and creating the new corporation, The Jeffersonville, Madison and Indianapolis Railroad Company, one of the appellees herein, as those alleged in the preceding paragraphs; but the averments of the third paragraph, in regard to the extent and manner of the appropriation, by the Jeffersonville Railroad Company, of the right of way for its line of railroad, differ so much from the alle-

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gations of the preceding paragraphs, on the same subject, as to make it necessary for us to set out these averments in this opinion. They were, in substance, as follows:

"And in the month of June, 1851, said railroad company was constructing said railroad as aforesaid, under and in pursuance of the authority aforesaid, and having previously so appropriated and located said road sixty feet wide, entered upon and constructed said railroad upon and over the real estate described in the complaint, doing no unnecessary injury or damages, which was then the property of said Reason W. Prather, and so continued until his death; and said Prather made no claim or demand whatever for damages or compensation for said appropriation of said property within two years thereafter, nor did he thereafter make any such claim or demand. Said real estate is situated between Jeffersonville and Columbus, Indiana, and, at the time said appropriation was made as aforesaid, said Reason W. Prather was a person of sound mind, over the age of twenty-one years, and resided, and continued to reside, until this action was commenced, on the real estate described in said complaint. And no agreement was ever had or attempted to be made between said parties for compensation to, and damages sustained by, said Prather, if any, for and on account of said appropriation, nor was any application ever made by either of said parties to any justice of the peace of said county, or other officer or authority for a jury or arbitrators to assess said Prather's compensation and damages aforesaid. Defendants say that the width of the right of way of said road over said real estate was, and is, by virtue of said appropriation, location, and said charter and amendments, sixty feet, and by said appropriation said railroad acquired a right of way for said road over said real estate sixty feet wide, for the then and subsequent proper uses of said company and the owners and operators of said road, such as they from time to time should deem necessary for the purposes of making and maintaining all necessary repairs, improvements and fences, and to insure speed and safety in the

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transit of trains over said road. And in order to securely fence in the track of said railroad, and properly maintain the fencing as required by law, it is necessary to have sufficient space and room for the erection and repairs thereof, and for the necessary repairs of said road, and to prevent the injury and destruction of the fencing by fires communicated by and from locomotives passing over said road, to erect and maintain said fencing, on both sides of the track, a distance of not less than twenty-nine feet from the center of said railroad track. The track of said road was constructed over and upon the center of said right of way through said real estate, where it still remains." And "the defendants say that in order to insure dispatch and safety in the transaction of the business of said railroad, the companies aforesaid owning and operating the same have ever since, to wit, 1853, and as soon after the road was completed as said improvements were needed and could be conveniently made, used the telegraph, having a telegraph line, instruments and operators at all the principal stations of said road, whereby the business thereof is greatly facilitated and the interest of the travelling and shipping public greatly subserved; that the trains thereon are, and have been ever since 1853, run by telegraph, which is essential in order to secure the proper speed and safety of trains. In order to secure such telegraph facilities, the said first named railroad company in 1854 entered into an agreement with the defendant, The Western Union Telegraph Company, whereby said telegraph company, in consideration that said railroad company would furnish the right of way for telegraph poles and lines along said road over the right of way of said railroad company, said telegraph company would construct and keep in repair a telegraph line along said road, and furnish one telegraph wire for the exclusive use of said railroad company. Said telegraph line was constructed on the east side of said railroad track, the telegraph poles being planted at a distance of, to wit, twenty feet therefrom, and they were so planted over said real estate, and so used without objection on

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the part of said Reason W. Prather until the change thereof hereinafter mentioned. And defendants further say that the United States Telegraph Company, in the year, to wit, 1856, by and with the consent of said railroad company, constructed and operated a telegraph line along the west side of said railroad track, at a distance of twenty feet from the center of said railroad track, on the lands described in the complaint, and within sixty feet, until the year, to wit, 1869, all without objection on the part of said Prather. The poles of said line on the east side of said track were of a length and height necessary, and no more, to protect the telegraph wires from injuries and obstructions, but they were of a length and height that when thrown down by winds and storms, or otherwise, in the direction of said railroad track, that they would and did fall upon and across said track, thus endangering the lives of the travelling public, and obstructing and delaying the business of the road. It therefore became necessary, in order to avoid such dangers and delays, to set the telegraph poles a distance from the railroad track sufficient to avoid the recurrence of such casualties. After the consolidation as aforesaid of said two railroad companies, said Jeffersonville, Madison and Indianapolis Railroad Company renewed said contract and agreement with said telegraph company, and it was in repairing said telegraph line over the real estate described in the complaint, that the acts complained of were done, the defendants, other than said telegraph company, acting as the agents and employees of said telegraph company to do and perform said work, and not otherwise. And no act was done other than was necessary to clear the way for, and erect and maintain said telegraph line over said real estate, and said telegraph poles were planted where they now stand, on the right of way of said railroad company, over said real estate a distance of twenty-nine feet from the center of said railroad track. And defendants aver that said poles were planted at said distance from said track by the order and direction of said railroad company, in order, as it was necessary so to do,

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to prevent the obstruction of said road, and the accidents and damages incident thereto of the falling or blowing down of said poles by winds and storms, and the poles were of a length, and not less than that if thrown in the direction of the railroad track they would not reach it, and it was necessary to have said poles of such length in order to protect the telegraph wires from injuries and obstructions. It is averred that no record was made or kept of said appropriation, or of the quantity or location of the land appropriated, or, if any was made, the same has been destroyed, and can not be found, or the contents of it be ascertained."

The fourth paragraph of appellees' answer does not differ materially from the preceding paragraphs, in so far as the general averments of facts are concerned, but only as to the allegations in regard to the manner and extent of the appropriation by the railroad company for the right of way of its line of railroad. In this regard, the allegations of the fourth paragraph of answer were, in substance, as follows:

"And in the month of June, 1851, said railroad company, then constructing said railroad as aforesaid, entered upon, located and constructed said railroad upon and over the real estate described in the complaint, which was then the property of said Reason W. Prather, and so continued until his death. And said Prather made no claim or demand whatever for damages or compensation for said appropriation of said property within two years thereafter, nor did he thereafter make any such claim or demand. Said real estate is situated between Jeffersonville and Columbus, Indiana, and at the time when said appropriation was made as aforesaid, said Reason W. Prather was a person of sound mind, over the age of twenty-one years, and resided and continued to reside on said real estate described in said complaint until this action was commenced, and no agreement was ever had or attempted to be made between said parties for compensation and damages sustained by Prather for and on account of said appropriation, nor was any application ever made by either party

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to any justice of the peace of said county or any other officer or authority for a jury or arbitrators to assess said Prather's damages and compensation aforesaid. The defendants say that the width of the right of way of said railroad over said real estate was and is sixty feet by virtue of said location and construction of said road and said charter and amendments, and said company thereby acquired a road and right of way over said real estate sixty feet wide—the track of the road was constructed on the center thereof, where it still remains."

In each of the paragraphs of appellees' answer, and upon the appellants' demurrers thereto, for the alleged want of sufficient facts therein, questions are presented which manifestly depend for their proper decision upon the construction to be placed upon the rights, privileges and franchises conferred upon the appellee, the railroad company, under the laws of this State, which constituted the charter of the Jeffersonville Railroad Company. These questions may be briefly stated as follows:

1. What is the width of the right of way acquired by the Jeffersonville Railroad Company?

2. What estate did the company acquire in its right of way? Was it an estate in fee simple, or an easement merely? And,

3. If the estate was a mere easement, could the company itself, or by contract with its codefendant, lawfully erect telegraph poles within the width of such easement?

The Jeffersonville Railroad Company was incorporated under the corporate name of "The Ohio and Indianapolis Railroad Company," by an act approved January 20th, 1846. Local Laws 1846, p. 153. Of this act we will set out in this connection so much as has any bearing upon the questions for decision in this case, in substance, as follows:

Sections 14 and 15 of the original charter (Local Laws 1846, pages 156 and 157):

"Sec. 14. That the president and directors of said company

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shall be, and they are hereby invested with all the rights and powers necessary for the construction and repair of a railroad from the town of Jeffersonville, near the falls of the Ohio, to the town of Columbus, in the county of Bartholomew, not exceeding sixty feet wide, with as many set of tracks as the said president and directors may deem necessary ; and that they may cause to be made, or contract with others for making said railroad or any part of it, and they, their agents or those with whom they may contract for making any part of the same, or their agents may enter upon and use and excavate any land which may be wanted for the site of said road, or the erection of warehouses or other works necessary to said road, or for any other purpose necessary or useful in the construction or repair of said road, or its works ; and that they may build bridges, provided the same do not obstruct the navigation on navigable streams ; may fix scales and weights ; may lay rails ; may take and use any earth, timber, gravel, stone, or other materials which may be wanted for the construction or repair of said road or any part of its works, and may make and construct all works whatsoever, which may be necessary and expedient, in order to the proper completion of said road.

“Sec. 15. That the president and directors of said company, or a majority of them, or any person or persons authorized by a majority of them, may agree with the owner or owners of any land, earth, timber, gravel, or stone, or other materials, or any improvements which may be wanted for the construction or repair of any of said road, or any of their works, for the purchase, or use and occupation of the same ; and if they can not agree, and if the owner or owners of any of them be a *feme covert*, under age, *non compos mentis*, or out of the county in which the property wanted may lie, when such land or materials shall be wanted, application may be made to any justice of the peace in the county where such land or materials shall lie, who shall thereupon issue his warrant, under his hand and seal, directed to the sheriff of said county, requiring him to summon a jury

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of twenty inhabitants of said county, not related or in any wise interested, to meet on the land or near to the other property or materials to be valued, on a day named in said warrant, not less than ten nor more than twenty days after the issuing of the same ; and if at said time and place, any of said jurors summoned do not attend, the said sheriff shall summon, immediately, as many jurors as may be necessary with the jurors in attendance, to furnish a panel of twenty jurors in attendance ; and from them each party, its, his, or her, or their agent, if either be not present in person or by agent, then the sheriff, for it, him, or her, may strike off four jurors, and the remaining shall act as the jury of inquest of damages ; and before they act as such, the said sheriff shall administer to each of them an oath, or affirmation as the case may be, that he will justly and impartially value the damages which the owner or owners will sustain, by the use or occupation of the land, materials or other property required by the company ; and the jury estimating such damages, shall take into the estimate the benefit resulting to the owner or owners from the construction of the said railroad through, along or over the property of said owner or owners ; but only in extinguishment of the claim for damages ; and the jury shall reduce their inquisition to writing and shall sign and seal the same, and it shall then be returned by the said sheriff to the clerk of the circuit court of his county, and by such clerk filed in his office, and shall be confirmed by the circuit court of said county at its next session, if not sufficient cause to the contrary be shown ; and when confirmed shall be recorded by said clerk, at the expense of said company ; but if set aside by said court, for good cause shown, the said court shall direct another inquisition to be taken in the same manner as above prescribed ; and such inquisition shall describe the property taken or the bounds of the land condemned ; and the quantity or duration of the interest of the owner or owners in the same, valued for the company ; and such valuation, when paid or tendered to the owner or owners of said property, or his, or her, or their legal

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representative, shall entitle the said company to the estate and interest in the same, thus valued, as full, as if it had been conveyed by the owner or owners of the same; and the valuation if not received when tendered, may at any time thereafter be received from the company, without cost, by the owner or owners, his, her, or their legal representative or representatives."

On the 8th day of February, 1848, an act became a law, without the approval of the Governor, amendatory of the aforesaid act of January 20th, 1846. Local Laws 1848, p. 479.

The third section of this act of 1848 is as follows:

"Sec. 3. For the purpose of constructing the work authorized by this act and the act to which this is amendatory, said company shall have and enjoy all the powers and rights conferred upon the State, and be subject to all the liabilities on her imposed by an act entitled 'an act to provide for a general system of internal improvement,' approved January 27th, 1836, and shall have all the rights, privileges, and franchises granted to certain associations by an act entitled 'an act to provide for the continuance of the construction of all or any part of the public works of this State by private companies, and for abolishing the Board of Internal Improvement, and the offices of Fund Commissioner and Chief Engineer,' approved January 28th, 1842."

On the 15th day of January, 1849, another act was approved, amendatory of the charter of the Ohio and Indianapolis Railroad Company, and changing its corporate name to "The Jeffersonville Railroad Company." Of this act we set out the following sections:

"Section 1. *Be it enacted by the General Assembly of the State of Indiana,* That the name and style of the Ohio and Indianapolis Railroad Company, be and the same is hereby changed, and said company shall hereafter be known by the name and style of the Jeffersonville Railroad Company, and by said new name shall have and possess all the rights, privileges, and franchises granted, and be subject to all the

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liabilities imposed by an act to incorporate the Ohio and Indianapolis Railroad Company, approved January 20, 1846, as such rights, privileges, franchises, and liabilities would have existed had the name and style of said company not been changed.

"Sec. 3. It shall be lawful for said railroad company to take, hold, sell, and convey any and all lands and tenements which may be conveyed or granted or released to said company for the purpose of constructing and keeping in repair the work authorized by the act incorporating the Ohio and Indianapolis Railroad Company, referred to in the first section of this act: *Provided*, Such company shall within ten years from such grant or conveyance, sell or dispose of all such lands as may be so granted, conveyed, or released; except so much as may be embraced in the width of the road allowed by charter and for depot grounds and water stations for said road, and an additional amount not exceeding three thousand acres which said company may retain and possess for the purpose of supplying timber and stone for the construction and use of said road.

"Sec. 5. For the purpose of constructing said road with all desirable appendages, and for putting and keeping the same in repair and for doing all proper business thereon, said company are hereby authorized to enter upon, take, and hold in fee simple all real estate and materials necessary for that purpose, doing no unnecessary damage, and when such real estate or materials can not be had by donation or fair purchase, the owner may file his claim for damages in the office of the secretary of the company, and select an arbitrator, whereupon the company shall select another, and these two a third, who shall be disinterested men, and within a reasonable time, having been sworn, they shall proceed to examine the case and make out and file their award in the premises with said secretary, from which award either party may appeal to the circuit court of the county where the secretary keeps his office; which appeal shall be in all things, regulated and tried as ap-

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peals are from the judgment of a justice of the peace in this State; said secretary being regarded as such justice in this behalf, and whenever [any] real estate is so taken or is damaged, the arbitrators, court, or jury trying the case shall estimate any and all advantages said road may be to the other real estate of the claimant adjacent or contiguous to that taken, deduct such advantages from the damage done, and find for the claimant the balance only, if any there be, if there be none the claimant shall pay all costs, if damage be recovered the company shall pay the cost, and that all claims for damages shall cease unless applied for in two years next after the property shall have been taken possession of by said company."

In the 4th section of the act of December 29th, 1849, the General Assembly prescribed and declared, as a rule of construction, that "This act and the acts and amendments heretofore passed incorporating said company shall be deemed public acts, and shall be favorably construed for all beneficial purposes." Local Laws 1850, p. 424.

With the foregoing summary of the pleadings in this cause, and the quotations of the statutes of this State which govern and control the questions we are required to decide, we proceed now to their consideration and decision. It will be observed that the original act of January 20th, 1846, and the amendments thereof, in 1848, 1849 and 1850, had all been passed prior to the entry of the Jeffersonville Railroad Company upon, and its appropriation of, the real estate of the appellants in June, 1851. The original and amendatory acts were passed, and the appropriation was made while the Constitution of 1816 was yet the fundamental law of this State, and before the taking effect of the Constitution of 1851. In section 7, of article 1, of the Constitution of 1816, in force at the time, it was provided as follows: "That no man's particular services shall be demanded, or property taken or applied to public use, without the consent of his representatives, or without a just compensation being made therefor." Under this con-

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stitutional provision it was held by this court that private property might be taken for, and applied to, a public use, before making compensation therefor. *Rubottom v. McClure*, 4 Blackf. 505; *Hankins v. Lawrence*, 8 Blackf. 266; *McCormick v. President, etc.*, 1 Ind. 48.

The right of eminent domain, the right to take property, public or private, and apply the same to public use, is an inherent right in the State government. The exercise of this right, the power to authorize, control and direct its exercise, is vested in the General Assembly, subject to no restrictions or limitations, except such as were or are imposed by the fundamental law, State or Federal. In *Water Works Co. v. Burkhart*, 41 Ind. 364, in speaking of the right of eminent domain, it was said: "It is not conferred, but limited by the constitution. The limitation does not relate to the amount of the estate in property to be taken." The only limitations, as well under the constitution of 1851 as under the constitution of 1816, were that a just compensation should be made for the property taken, and this compensation under the latter constitution, except in case of the State, was to be "first assessed and tendered." The validity or constitutionality of the legislation above quoted, under which the Jeffersonville Railroad Company entered upon, took and held the real estate of the appellants' ancestor, can not therefore be questioned; nor can it be questioned, as it seems to us, that such real estate was so taken and held in fee simple, and not merely as an easement therein. The difficult question for determination, in this case, is the width of the strip of land so taken and held by the railroad company in fee simple, by its action in entering upon, and constructing its line of railway over and through, the real estate of the appellants' ancestor. Of this question, when the case was here before, the court said:

"If the company had taken possession of and occupied sixty feet in width, there can be no doubt that she would have acquired title to the whole of the strip so occupied; but having appropriated and used less than sixty feet, the extent

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of her right must be limited by her necessities to the extent that she had possessed, occupied and used the same.

"On the other hand," the court said, "it is contended by counsel for appellant that the company appropriated and took possession of only so much of his land as is actually occupied by the track of said road, being about four feet in width, and the space occupied on the west side of said track by telegraph poles, which were set nineteen feet from the center of said track, and had been maintained there from the construction of said road until the grievances complained of in the complaint were committed; in other words, that the only right which the company acquired in and to the appellant's land was to that portion actually possessed, occupied and appropriated by said company prior to and at the time of the consolidation of said companies, and that no more passed to such new corporation. The position assumed by counsel for appellant is as untenable as that taken by counsel for appellee, and can not be maintained." The position taken by counsel for the railway company was, "that by entering upon and constructing her road-bed over such lands, she acquired a strip of land sixty feet wide."

In the enactment of the several statutes, which constituted the charter of the Jeffersonville Railroad Company, at the time it entered upon and constructed its road-bed over the lands of appellants' ancestor, in June, 1851, what limit did the Legislature impose, or intend to impose, upon the width of its line of railroad? By section 14, above quoted, of its original charter, the company was "invested with all the rights and powers necessary for the construction and repair of a railroad from the town of Jeffersonville, near the falls of the Ohio, to the town of Columbus, in the county of Bartholomew, not exceeding sixty feet wide, with as many set of tracks as the said president and directors may deem necessary; * * * * and they, their agents or those with whom they may contract for making any part of the same or their agents may enter upon and use and excavate any land which may be wanted for the

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site of said road, or the erection of warehouses or other works necessary to said road, or for any other purpose necessary or useful in the construction or repair of said road, or its works," etc.

In the third section, above quoted, of the amendatory act of February 8th, 1848, it was declared that "For the purpose of constructing the work authorized by this act and the act to which this is amendatory, said company shall have and enjoy all the powers and rights conferred upon the State, and be subject to all the liabilities on her imposed by an act entitled 'an act to provide for a general system of internal improvement,' approved January 27, 1836, and shall have all the rights, privileges, and franchises granted to certain associations," by the act of January 28th, 1842, "to provide for the continuance of the construction of all or any part of the public works of this State by private companies," etc.

In section 5, above quoted, of the amendatory act of December 29th, 1849, it was provided that "For the purpose of constructing said road with all desirable appendages, and for putting and keeping the same in repair and for doing all proper business thereon, said company are hereby authorized to enter upon, take, and hold in fee simple all real estate and materials necessary for that purpose, doing no unnecessary damage." Under section 3, above quoted, of the last amendatory act, it was declared to "be lawful for said railroad company to take, hold, sell, and convey any and all lands and tenements which may be conveyed or granted or released to said company for the purpose of constructing and keeping in repair the work authorized by the act incorporating the Ohio and Indianapolis Railroad Company, referred to in the 1st section of this act: *Provided*, Such company shall within ten years from such grant or conveyance, sell or dispose of all such lands as may be so granted, conveyed or released; except so much as may be embraced in the width of the road allowed by charter," etc.

Construing together these provisions of the charter of The

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Jeffersonville Railroad Company, all of which were in force at the time it entered upon and constructed its road-bed over the lands of Reason W. Prather, in June, 1851, we are of opinion that the company, by such entry and construction, acquired, took and held, in fee simple, the full width of the road allowed by such charter over, through and across such lands, namely, "sixty feet wide," and no more, and, certainly, no less. It was competent, no doubt, for the railroad company to limit the width of its appropriation of lands, under the right of eminent domain so liberally delegated to it by the General Assembly in its charter, to less than sixty feet; but, where no such limitation affirmatively appeared, and the width of its appropriation was shown only by its entry upon and the construction of its road over and through such lands, it must be held, we think, that such width was the full width allowed by its charter, namely, "sixty feet wide." This was the width which the Legislature fixed and determined upon as the proper and necessary width of the contemplated railroad, authorizing the company, however, in the prosecution of its enterprise, to enter upon, take and hold in fee simple real estate of a less width than sixty feet, if its president and directors might deem such action necessary.

When the Jeffersonville Railroad Company was incorporated the State was just beginning to recover from the disastrous results of its system of internal improvements. Its railroad enterprises were yet in their infancy, and many of the railroads, which have since contributed so largely to the general prosperity and material wealth of the State, were then not even contemplated. The legislative policy of the State was to promote the construction of railroads by private corporations, and to grant them liberal rights, privileges and franchises, and thereby encourage the investment therein of private capital. Such was the policy, doubtless, which prompted the enactment of the several statutes, which, in June, 1851, constituted the charter of the Jeffersonville Railroad Company. This policy, also, it may well be supposed, induced the Leg-

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islature to declare, as a rule of construction, that the several acts, original and amendatory, "incorporating said company shall be deemed public acts, and shall be favorably construed for all beneficial purposes." With this rule in view, we are clearly of the opinion that we have reached the right conclusion in regard to the width of the appropriation of the lands of Reason W. Prather, upon the facts alleged in each paragraph of the appellees' answer.

In *Inhabitants of Worcester v. Western R. R. Corp.*, 4 Met. (Mass.) 564, it appeared that the charter of the railroad company provided for a road "not exceeding five rods wide." Of this provision the court says:

"To the extent of five rods, it appears to us that the Legislature intended that the franchise of this corporation should extend, for any and all purposes incident to the object of its creation. * * * No doubt, in practice, the main use of the strip of land of five rods in width, in the greater part of its extent, will be for sustaining the track for the trains to pass over. But such restriction of its use is not found in the act, and therefore when the corporation have occasion to use any part of such strip of five rods for any of the purposes incident to their creation, it is within their franchise; and being used to promote the purposes contemplated by the act, it is exempted from taxation, as property appropriated to public use. This is the extent to which they are authorized to *take* land without the consent of the owner, and this therefore, we think, is the extent to which the law regards the land as appropriated to public use."

In *Babcock v. Western R. R. Corp.*, 9 Met. 553 (43 Am. Dec. 411), it appeared that the railroad company was authorized by its charter to lay out its road, not exceeding five rods wide; that Babcock had granted the company full and free license and authority to locate, construct and repair its road upon and over his lands, and to take to the extent authorized by their charter; and that subsequently the company had gone upon Babcock's lands, outside of the granted limits, to widen

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and deepen a ditch or drain to secure its railroad from damage. Babcock sued the railroad company for the alleged trespass, and it was held that he could not maintain the action. The court said :

"It is a general rule, we think, that a grant of power to accomplish any particular enterprise, and especially one of a public nature, carries with it, so far as the grantor's own power extends, an authority to do all that is necessary to accomplish the principal object. The court are therefore strongly inclined to the opinion that under the act of incorporation, * * * and the general laws respecting the establishing of railroads, the corporation had the authority in question, independently of plaintiff's deed." And the court further said : "It is a well known and reasonable rule, in construing a grant, that * all means to attain it, and all the fruits and effects of it, are granted also." See, also, *Brainard v. Clapp*, 10 Cush. 6.

In the case at bar, we think that the Legislature, in the original charter, fixed the width of the railroad when taken by the right of eminent domain, delegated to the railroad company, at the width of sixty feet over and through the lands of appellants' ancestor.

In *People v. Smith*, 21 N. Y. 595, the court said :

"The necessity for appropriating private property for the use of the public or of the Government is not a judicial question. The power resides in the Legislature. It may be exercised by means of a statute which shall at once designate the property to be appropriated and the purpose of the appropriation ; or it may be delegated to public officers, or, as it has been repeatedly held, to private corporations established to carry on enterprises in which the public are interested. There is no restraint upon the power, except that requiring compensation to be made. ** The exercise of the right of eminent domain stands on the same ground with the power of taxation. Both are emanations of the law-making power. They are the attributes of political sovereignty, for the exercise of which the Legislature is under no necessity to address itself

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to the courts. In imposing a tax or in appropriating the property of a citizen, or a class of citizens, for a public purpose, with a proper provision for compensation, the legislative act is itself due process of law."

When, therefore, the purpose and extent of the appropriation were clearly designated by the Legislature, as in the case in hand, that was decisive both of the necessity and of the extent of the appropriation, and the courts could neither extend nor limit, in such case, the purpose or extent of such appropriation. *United States v. Harris*, 1 Sumner, 21; *Water Works Co. v. Barkhart, supra*; *Nelson v. Fleming*, 56 Ind. 310. If Reason W. Prather had instituted the proper proceeding within the proper time, to have his damages assessed for the appropriation of his lands by the Jeffersonville Railroad Company, in June, 1851, it seems clear to us that upon the facts stated in either paragraph of appellees' answer, the railroad company could not have successfully claimed, in such proceeding, that the width of its appropriation was less than sixty feet. It might have limited its appropriation at the time it was made to a width less than sixty feet, but, not having done so, it must be conclusively presumed, we think, that by its entry upon, and its construction of its road over and through, the lands of Prather, the railroad company appropriated, took and held such lands to the full width allowed by its charter, namely, "sixty feet wide." The title thus acquired, taken and held by the Jeffersonville Railroad Company to the land, within the limits of its appropriation, was, under its charter, a title in fee simple, and the land under such title passed to and vested in the consolidated company, namely, The Jeffersonville, Madison and Indianapolis Railroad Company. Of course it was competent for the consolidated company, so owning and holding the land so appropriated, within the limits thereof, to erect itself or by contract with its co-appellee, The Western Union Telegraph Company, such telegraph poles as were necessary to the proper maintenance of a

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line of telegraph along the line of its railroad, or to do any other lawful act.

For the reasons given we are of opinion that the court committed no error in overruling the appellants' demurrers to the several paragraphs of the appellees' answer, or either of them.

The judgment is affirmed, with costs.

No. 10,041.

CARNAHAN v. THE WESTERN UNION TELEGRAPH COMPANY.

TELEGRAPH COMPANY.—Failure to Transmit Message.—Penal Statutes.—Conflict of Laws.—The statute (R. S. 1881, section 4176), giving a right to recover a penalty for failure of a telegraph company to transmit a message as required, has no extra-territorial force, and, therefore, is not applicable where the contract was made at an office in another State to send the message to this State.

From the Benton Circuit Court.

M. H. Walker and I. H. Phares, for appellant.

J. A. Stein and G. W. Collins, for appellee.

ELLIOTT, J.—Appellant's complaint alleges that the appellee was engaged "in telegraphing for the public," with a line of wires extending through the State of Illinois and into the State of Indiana; that it had an office at Fairbury, Illinois, and one at Oxford, Indiana; that, on the 21st day of May, 1881, appellant placed in the hands of appellee's agent at Fairbury a message addressed to Walter Carnahan, at Oxford, which message the appellee undertook, in consideration of twenty-five cents paid by appellant, to transmit; that the person to whom the message was addressed lived within less than one mile of the Oxford office, and that the appellee "wholly failed to transmit the message."

The court below held the complaint not sufficient to entitle the appellant to recover the statutory penalty imposed upon telegraph companies for neglect of duty.

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The allegations of the complaint show that the corporation is a telegraph company, with lines extending into this State. The pleading is clumsily drawn, but it is sufficiently certain on this point to repel a demurrer. *Western Union Tel. Co. v. Gougar*, 84 Ind. 176; *Western Union Tel. Co. v. Roberts*, 87 Ind. 377.

The action is for the recovery of a statutory penalty, and not for damages for a breach of contract. The right which the appellant seeks to enforce is the recovery of a penalty prescribed by statute for a breach of duty, and is, therefore, a right existing solely by virtue of statute. Statutes prescribing penalties have no force beyond the territorial limits of the State by which they were enacted. It is quite clear that our statute can not apply to acts done in Illinois. *Buckles v. Ellers*, 72 Ind. 220 (37 Am. R. 156); *Vandeenter v. New York, etc., R. R. Co.*, 27 Barb. 244; *Whitford v. Panama, etc., R. R. Co.*, 23 N. Y. 465; *Richardson v. New York, etc., R. R. Co.*, 98 Mass. 85; *Woodard v. Michigan, etc., R. R. Co.*, 10 Ohio St. 121. If the neglect of duty is to be regarded as having been committed in our sister State, then it is manifest that the action will not lie.

The right to recover the statutory penalty rests upon the ground that there is a valid contract. *Rogers v. W. U. Tel. Co.*, 78 Ind. 169 (41 Am. R. 558). It can not be contended, with any plausibility, that one who has no contract can collect the penalty, for the letter and the spirit of the statute plainly forbid such a conclusion. If there must be a contract, then it follows that the breach of duty occurs where the contract is made, and this we take to be the rule pronounced by our decisions, although appellant cites them as supporting his contention. In *Western Union Tel. Co. v. Hamilton*, 50 Ind. 181, it was held that the sender of a message delivered at an office in this State might recover the penalty, although all acts were rightly performed here and the wrong committed in Illinois. It was said in that case: "It is wholly immaterial where the act or omission occurred, whether at the office where it was received,

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at some intermediate point, or at the office to which it was sent. The contract can not in such case be said to have been violated at one place any more than at another. It is violated everywhere because it is performed nowhere." The logical deduction from this is that the right accrues at the time and place of delivering the message for transmission, and that it is this act which lies at the foundation of the right to insist upon the statutory remedy for a breach of duty. In the case of *Western Union Tel. Co. v. Lindley*, 62 Ind. 371, the message was delivered at an office in this State to be transmitted to Louisville, Kentucky, and it was held that the sender might recover the penalty although the only wrongful act was committed at the Louisville office. In the case cited it was said of a pleading filed in the case: "The theory of this paragraph of the answer is, that the appellant had fully complied with the requirements of the statute by the simple transmission of the message set out in the appellee's complaint from the appellant's office in Bloomington, Indiana, to its office in Louisville, Kentucky. This theory is in direct conflict with the plain letter of the statute. The contract of an electric telegraph company, in the receipt of a message, is the transmission of the same, not merely from one place to another, but from the person by whom it was sent to the person to whom it was addressed; and this is what the statute requires of such company." Carrying this doctrine to its legitimate extent leads to the conclusion that our statute applies only to cases where the message is received at an office in this State.

Unless we adopt the view that the statute only applies to contracts made in this State, we shall be involved in endless difficulty. Any other rule would make the telegraph company amenable to different punishments for the same wrong, for it is quite clear that if the wrong is punishable by the law of the place where the contract is made, it would be no answer to a prosecution there to plead a judgment rendered in another forum and under a different law. So, too, if we take a different view than that indicated, we should be compelled to

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hold that the sender of a message from an office in Canada might come to our State and recover the penalty, although his sole contract with the corporation was made in a foreign country.

It is to be observed that we are not dealing with an action for a breach of contract, nor with a civil action for damages resulting from a tort, but are concerned solely with a proceeding to recover a purely statutory penalty. It is well known that very different rules apply to actions for the vindication of rights recognized by the common law, from those prevailing in cases where the recovery of a statutory penalty is sought.

Judgment affirmed.

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89	529
126	561
127	464
89	529
135	305
89	529
147	397
89	529
161	21

QUIETING TITLE.—*Pleading.*—*Harmless Error.*—Where the general denial is pleaded to a complaint to quiet title, special paragraphs are useless under the statute, R. S. 1881, section 1055, and there can be no harm in sustaining demurrers to them.

WILLS.—*Descendant.*—*Heir.*—*Statute Construed.*—The word "descendant," as used in section 2571, R. S. 1881, means an heir in the descending line, and can not include collateral kindred, such as a brother.

SAME.—*Lapse.*—*Devise.*—*Descent.*—A will disposed of the residue of the estate, real and personal, to the testator's brothers, J., T., F. and A. J. died before the testator, leaving a widow and child, and the testator died seized of lands, and with no wife, child or parent surviving him.

Held, that the devise to J. lapsed, and the lands went to the three surviving brothers, by virtue of the residuary clause of the will.

SAME.—The former distinction between lapsed bequests and lapsed devises, as to their disposition, is destroyed by sections 2567 and 2571, R. S. 1881.

From the Greene Circuit Court.

L. Shaw and J. S. Bays, for appellants.

A. G. Cavins and E. H. C. Cavins, for appellees.

VOL. 89.—34

West *et al.* v. West *et al.*

HAMMOND, J.—Action by the appellees against the appellants, to quiet title to real estate in Greene county. The appellants, Nancy A. West and Lillie B. W. Holt, who is the wife of James Holt, filed separate answers. The second paragraph of each answer was the general denial. A demurrer was sustained to the first paragraph of each answer, and of this the appellants complain. The ruling, even if erroneous, was harmless. The general denial being pleaded, evidence of every defence, in an action like the present, was admissible under it. Sec. 1055, R. S. 1881; *Berlin v. Oglesbee*, 65 Ind. 308.

There was a trial by the court, and, on the proper request, a special finding of the facts was made, with conclusions of law to the effect that the appellees owned the real estate in controversy, and that the appellants had no title or interest therein. The appellants excepted to the conclusions of law, and assign the same as errors in this court. The following are the facts:

The residuary clause in the will of Edward West, which was executed September 27th, 1875, is as follows:

“Item 8. I will and bequeath all the residue of my estate, real and personal, of whatever kind or description, to my four brothers, Jeremiah West, Thomas Y. West, Freeman West and Arzy West, the same to be shared by them equally.”

The testator died September 30th, 1876, seized of the real estate in controversy, leaving neither wife, child, father or mother surviving. The brother Jeremiah, named in the will as one of the residuary devisees, died intestate in January, 1876, during the lifetime of the testator, leaving surviving him his widow, Nancy A. West, and his only child, Lillie B. W. Holt, who are appellants herein. The other brothers named in the will are the appellees. All the legacies mentioned in the will and all the debts of the testator, including expenses of administering the estate, were paid out of personal assets before the commencement of this action. The question for decision is whether the appellants, the widow and daughter of Jeremiah West, deceased, or either of them, have or has any in-

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terest in the real estate in controversy, either under the will or as heirs or heir of the testator.

"The general rule is well settled, that where the legatee dies before the testator, the legacy will lapse." 2 Redfield Wills, p. 157, sec. 8; *Maxwell v. Featherston*, 83 Ind. 339. The only exception in this State to this general rule is found in section 13 of the act relating to wills, being section 2571, R. S. 1881, which reads: "Whenever any estate, real or personal, shall be devised to any descendant of the testator, and such devisee shall die during the lifetime of the testator, leaving a descendant who shall survive such testator, such devise shall not lapse, but the property so devised shall vest in the surviving descendant of the devisee, as if such devisee had survived the testator, and died intestate." The contention as to whether the devise to Jeremiah lapsed or went to the appellants or either of them, under the will, arises upon the meaning of the word "descendant," in the above statute. If, as appellants claim, Jeremiah was a *descendant* of his brother, the testator, the devise to him did not lapse, but went, under the will, to the daughter, if not to both widow and daughter. We are of opinion, however, that the word "descendant," as used in the statute above, does not apply to a brother of a testator. It refers, we think, exclusively to a lineal descendant, as a child or a grandchild. A descendant, as usually understood, is an heir in the direct descending line. The word as used in the statute to prevent, in a certain contingency, the lapse of a devise, does not apply to kindred of the collateral line. In *Baker v. Baker*, 8 Gray, 101, it was held that the word "descendants" in a will can not be construed to include any but lineal heirs, unless there are clear indications in the will of the testator's intention to extend the meaning. Our laws of descent use the word with the same signification. Thus, in section 2469, R. S. 1881, it is provided that "If any intestate shall die without lawful issue or their descendants alive, one-half the estate shall go to the father and mother of such intestate, as joint tenants, * * * *

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and the other half to the brothers and sisters and to the descendants of such as are dead, as tenants in common." It is true that section 2485 provides, that, on the death of a wife, one-third of her real estate shall *descend* to her husband ; but, in *Prather v. Prather*, 58 Ind. 141, it was held that the husband is not a descendant of the wife. In *Gray v. Bailey*, 42 Ind. 349, *Holbrook v. McCleary*, '79 Ind. 167, and also in *Prather v. Prather*, *supra*, in all of which section 2571 of the statute was considered, the meaning of the word "descendant," as herein held, was plainly recognized.

We must hold, with the court below, that, on the death of Jeremiah before the testator, the devise to him lapsed, and that, consequently, nothing vested in the appellants, or either of them, by virtue of the will.

The remaining question is, has either of them any title as heir of the testator? Had Edward West died intestate the appellant Lillie B. W. Holt, as the only child of her deceased father, Jeremiah, would take the portion which her father would have taken had he survived Edward ; and if any part of Edward's estate is undisposed of by his will, she may claim her portion thereof as heir. Whether or not any part of the estate is so undisposed of, is ascertained by determining whether or not the lapsed devise, which was made to Jeremiah, vested in the residuary devisees at the death of the testator. At common law, a distinction was recognized between a lapsed bequest of personal property and a lapsed devise of real estate ; the former going to the residuary legatee, the latter to the heir. 4 Kent Com. 541 ; *Greene v. Dennis*, 6 Conn. 293 ; S. C., 16 Am. Dec. 58 ; *Gore v. Stevens*, 1 Dana (Ky.) 201 ; S. C., 25 Am. Dec. 141. The reason given for the distinction was that a bequest of personal property had reference to the state of the testator's property at the time of his death, but that a devise operated only upon land of which he was seized when he made his will. The reason for the distinction does not exist in this State. Sec. 2567, R. S. 1881, provides that " Every devise in terms denoting the testator's intention to devise his entire interest in all his real or per-

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sonal property, shall be construed to pass all of the estate in such property, including estates for the life of another, which he was entitled to devise at his death." In construing this section with section 2571, this court, in *Holbrook v. McCleary, supra*, in passing upon the precise question now under consideration, says: "Two things are manifest, as it seems to us, from this legislation: 1. That the distinction between a void or lapsed bequest of personal estate, and a void or lapsed devise of real estate, * * * has no place in the law of this State; and 2. That the Legislature of this State, in the section of the statute last cited [sec. 2571], has impliedly, at least, placed lapsed devises of real estate, and lapsed bequests of personal estate, on precisely the same footing." It was held in the same case that the lapsed devise sank into the residuum, and passed under the general residuary clause of the will to the surviving residuary devisees. That well considered case is decisive of the present, and leads to the inevitable conclusion that the lapsed devise to Jeremiah West vested at the testator's death in the appellees, as the residuary devisees of the will. We find no error in the record.

Judgment affirmed, at appellants' costs.

No. 10,917.

GRUNSON ET AL. v. THE STATE.

CRIMINAL LAW.—Larceny.—Obtaining Money by Fraud.—C., a passenger on a railway train, was seated with G., when S. entered, wearing a badge and falsely pretending to be an express agent, and informed G. that if he wished his baggage taken to Cincinnati he must pay charges thereon. G. offered a bank check, which S. said he could not cash, but would do so at Cincinnati if C. would cash it and hold it till they reached that city. C. handed over the money, when G. and S. rushed from the train, taking both money and check. G. had no goods on board by express, and the whole proceeding by G. and S. was a pre-arranged trick concocted by them to get possession of C.'s money, with intent to steal it. Held, that it was larceny by both.

89	533
136	152
89	533
148	407
89	533
165	401
165	476
89	533
169	388

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From the Criminal Court of Marion County.

J. L. Mitchell, for appellants.

F. T. Hord, Attorney General, *W. T. Broun*, Prosecuting Attorney, and *W. B. Hord*, for the State.

ELLIOTT, J.—Appellants were jointly tried and convicted of the crime of larceny. It appears from the evidence that Thomas H. Combs was a passenger on a railway train, having entered it at Chicago; that Grunson had taken and was sitting in a seat with Combs; that shortly before the train reached the city Smith entered the car and was introduced by Grunson to Combs, under the name of Adams; that he represented himself as an express agent; that Grunson had previously introduced himself to Combs as Mr. Harper, and had informed him that he was engaged in the business of buying and shipping furs, and had some goods on the way, which he intended to take to Cincinnati; when Smith came into the car he had on a badge and walked rapidly to Grunson, whom he addressed as Harper, saying to him that if he wanted his baggage forwarded to Cincinnati he must, under a recent rule, pay the charges. Grunson then took a bank check from his pocket, presented it to Smith, who looked at it and said, "The check is all right, but I have not the money that I can spare now to pay the difference," and suggested that Combs should let him have the money, hold the check until they got to Cincinnati, when he, Smith, would cash it. Thereupon Combs handed over the money, \$45, but did not get the check, as Grunson rushed from the train as it entered the depot, and, taking the check with him, went off with Smith. It was also shown that the express companies had no agent on the train, and that Grunson had no goods in their charge. Other evidence was given tending to show guilt, but it is unnecessary to set it out, as all the questions argued are presented by the synopsis we have given.

Appellants' counsel contend that a case of larceny was not made out, and that the case was tried upon a radically wrong

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theory. It is true, as counsel assert, that a person accused of a distinct crime can not be convicted of another and different specific offence.

There can be no doubt, under the evidence, of the felonious intent of the appellants to appropriate to their own use the property of Combs, nor can there be any doubt that this felonious intent existed prior to and at the time they obtained possession of the money. We have, then, two of the controlling elements of the crime of larceny, namely, the specific felonious intent and its existence at the time of the taking.

The principal and, in truth, the only point relied on by counsel is that the owner parted both with possession and title, and that there can, therefore, be no larceny. We know perfectly well that the general rule is, that, where the owner parts with title and possession, there is no larceny although there may be some other crime. This is, however, a general rule, to which there are marked exceptions, as well known and as fully recognized as the rule itself. Mr. Bishop, upon whom the counsel rely as authority, clearly recognizes this exception. 2 Bishop Crim. Law, section 813. In the case, strongly urged upon our consideration by counsel, of *Welsh v. People*, 17 Ill. 339, a conviction was upheld where money was procured from the owner by a fraudulent game known as the ball and safe game, and the court said: "It is a well settled rule that where a party obtains possession of goods by fraud and deceit, not with the intention of returning them, but with the design of appropriating them and depriving the owner of them, and of all remedy for their loss, and does so appropriate or dispose of them, that is as much a larceny as if the possession had been obtained against the will of the owner." In another of the cases cited by appellants, *Smith v. People*, 53 N. Y. 111, the court said of the case before it: "Here the jury have found the intent to steal at the time of taking, which is all that is required to constitute larceny, where the mere possession is obtained by fraud or trick." Much reliance is placed upon the statement in *Williams v. State*, 49 Ind. 367, where, in

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speaking of the statute defining larceny, it was said that "This section, we think, does not make it larceny to obtain the property of another by fraud, lies, and false representations ;" but we are unable to perceive that appellants secure material support from this dictum. It is quite true that where there is no felonious intent to appropriate the property, existing at the time possession is obtained, there can be no larceny although there may be fraud. It is apparent from this examination of the authorities relied on by appellants, that their position is not sustained.

There are many well considered cases maintaining a view directly opposite to that of appellants. In our own case of *Huber v. State*, 57 Ind. 341 (26 Am. R. 57), the law was declared to be correctly laid down in Bicknell's Criminal Practice 335, where language very similar to that quoted from *Welsh v. People, supra*, was used, and it was said : " We think there was evidence tending strongly to show that the money was obtained from Walters by Huber by a mere trick, a fraudulently pre-arranged scheme or contrivance, with the intention of stealing it, and that, hence, the verdict is sustained by sufficient evidence." A conviction of larceny was sustained in a case where possession and property were parted with upon a fraudulent representation of the accused, although it was held that the original taking must be a trespass. Whart. Crim. Law, sec. 1865a. A trespass is any transgression or offence against the laws of nature or society, whether it relates to person or property. 3 Black. Com. 208. A writer, whose doctrines are regarded as authority in the true sense of the term, says : " And it seems, that where the property is obtained with a pre-concerted design to steal it, the possession is supposed to continue with the true owner, whatever may be the means or the pretence under which the property is obtained." 1 Hawkins P. C. 145. This brings us to solid foundation in principle, for it is universally held that where goods are obtained by fraud the true owner may reclaim them against all persons except *bona fide* purchasers, and they are protected upon the ground that

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commercial good requires it, and not upon the ground that the person guilty of fraud acquired title. *Parrish v. Thurston*, 87 Ind. 437; *Breckenridge v. McAfee*, 54 Ind. 141; Story Sales, section 172; *Badger v. Phinney*, 15 Mass. 359. We know that there has been much discussion upon the subject of larceny, and that many subtle distinctions have been made, but these discussions are, for the most part, as profitless as the ancient theological discussion whether angels could dance on the point of a needle.

There is no conflict in the evidence; none was given by the defence, and a case is made within the rule laid down by the most technical and exacting cases. The transaction was not complete, for the owner of the property did not get the check which was to have been delivered concurrently with the delivery of the money. Our opinion is that one who agrees to let another have money on a check is entitled to a genuine check, and that the transaction is not complete until such a check is delivered; but, however this may be, the prosecutor was unquestionably entitled to the check promised him, good or bad. We will not give heed to the claim of appellants that it was a worthless thing and would have done him no good; they are not in a situation to avail themselves of their own wickedness. The transaction was, therefore, not such as to pass the title to the property. In an old case cited in 2 East P. C. 677, it was said, according to this author, that the offence of the accused was larceny, "First, Because he should be said to have taken these goods with a felonious intent; for the act subsequent, viz. his running away with them, explained his intent precedent. Secondly, Because, although the goods were delivered, yet they were not out of the owner's possession by the delivery till the property was altered by the perfection of the contract; which was but inchoate, and never perfected between the parties." In further commenting on this case the author says: "It would bring great contempt on the justice of the Nation, as Hawkins somewhere observes, if its laws could be evaded by such tricks and contrivances as

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these." As illustrating the general doctrine may be cited the old cases known as the "ring cases," which are cited and discussed in 2 East P. C. 678, and the cases of an analogous nature referred to by the same author. East P. C. 675, 680. In *Shippy v. People*, 86 N. Y. 375 (40 Am. R. 551), the owner sold to the accused goods to be paid for on delivery, and delivered them to the carrier, with instructions to collect the price before delivering to the purchaser. The latter received the goods and paid for them by a worthless check; and he was held rightly convicted of larceny, the court, in the course of the opinion, saying: "The jury may have found that this was his scheme at the beginning, and thus that there was on his part a felonious intent—an *animus furandi*—pervading the transaction and continuing to the end; that there was no delivery by the owner or parting with the title; and, if so, the verdict was right." In *Hildebrand v. People*, 56 N. Y. 394 (15 Am. R. 435), the general question is fully considered, and the court said: "It is urged that this is not sufficient to convict, because the prosecutor voluntarily parted with the possession not only, but with the property, and did not expect a return of the same property. This presents the point of the case. When the possession and property are delivered voluntarily, without fraud or artifice to induce it, the *animus furandi* will not make it larceny, because in such a case there can be no trespass, and there can be no larceny without a trespass. *People v. McDonald*, 43 N. Y. 61. But in this case I do not think the prosecutor should be deemed to have parted either with the possession of, or property in, the bill. It was an incomplete transaction, to be consummated in the presence and under the personal control of the prosecutor." These expressions of the New York court are the more weighty because some of the cases in that court incline to a more technical rule than most of the American courts. The facts in the case of *Miller v. Commonwealth*, 78 Ky. 15 (39 Am. R. 194), were these: The defendant, by a pre-arranged scheme concocted with a confederate, had made it certain that a bet on a game should be lost, and fraudu-

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lently induced the prosecutor to loan him money to wager on the game, and a conviction of larceny was sustained, the court placing its decision mainly upon the case of *Rex v. Horner*, 1 Leach, 305. In the recent case of *Justices v. People, ex rel.*, 90 N. Y. 12 (43 Am. R. 135), the doctrine of *Regina v. Thomas*, 9 C. & P. 741, was expressly repudiated, and it was said: "The relator left his restaurant with the coin under the pretence of obtaining change, and immediately gambled it away and did not return. These facts warranted the jury in finding that, when he left the presence of the prosecutor, he took the coin with him with the intent to steal it. This, within all the authorities, except the one hereinafter referred to, justified his conviction for larceny."

We think it clear that, where the uncontradicted evidence shows that, at and before the time of securing possession, the intent to steal had been formed, and trickery was resorted to in order to enable the accused to commit a theft, the offence is larceny, and must be so defined by the court. If there existed a mere intent to defraud and not to steal, then the offence is not larceny. In the case before us the evidence admits of but one interpretation, and that is, that the appellants had formed the intent to steal, and had preconcerted a fraudulent scheme for the purpose of executing this felonious intent.

We do not deem it necessary to discuss the instructions in detail; we think it enough to say that those given by the court are in harmony with the principle declared in *Huber v. State, supra*, and here approved, and that those asked by appellants are in conflict with it.

It is an established rule of practice that where an issue of fact is presented to the trial court and determined by it, the appellate court will respect that judgment where there is a conflict of evidence and the finding is fairly sustained. We can not, therefore, disturb the finding upon the question whether or not one of the jurors was asleep during the trial, and there is evidence supporting that decision.

Judgment affirmed.

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No. 10,619.

89 540
148 149
150 423

IRWIN v. LOWE ET AL.

RAILROADS.—Aid.—Election and Returns.—Informality.—Mere informalities in the returns of an election concerning aid to a railroad, which can not possibly prejudice any substantial right, or a failure to conform to any requirement of the statute which is directory only, or an error which is clearly clerical, are not sufficient to defeat the appropriation voted.

SAME.—Forfeiture.—Conditions.—County Commissioners.—When a petition for aid is upon conditions, expressed in the petition, that the road shall be completed through the township, and a depot erected thereon, by a day named, a failure to perform the conditions forfeits the aid voted; under the provisions of the statute, R. S. 1881, sections 4045 and 4062; and, after such forfeiture, the aid so voted will be no obstacle to voting aid to another railroad upon proper petition under section 4045.

SAME.—Cities.—Constitutional Law.—It is no impediment to granting aid by a township that it includes a city which is in debt to the extent permitted by the constitution.

SAME.—Appeal.—Practice.—On appeal from an order of the county commissioners, levying a tax to meet an appropriation in aid of a railroad, the questions to be tried are those only which have been put in issue before the board.

BRIEF.—Merely calling the attention of the Supreme Court to a question, and asking its judgment upon it, is no such argument of the question as, under the rules of the court, will secure its decision thereon.

From the Bartholomew Circuit Court.

S. Stansifer and W. D. Stansifer, for appellant.

F. T. Hord, W. B. Hord and N. R. Keyes, for appellees.

ZOLLARS, J.—This case was instituted before the board of commissioners of Bartholomew county, to contest and overthrow an appropriation of \$70,000, by Columbus township in said county, to aid in the construction of The Columbus, Hope and Greensburg Railroad. Appellees were the petitioners for the appropriation. The material facts, as shown by the record, are as follows: At a special session of the board of commissioners of Bartholomew county in February, 1880, a petition, signed by the requisite number of qualified voters and freeholders of Columbus township, was presented,

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asking for an appropriation of \$69,714.96, by said township, to the Evansville, Seymour and Bellefontaine Railway Company, and that the stock of said company to that amount be taken. The closing portion of the petition is as follows:

"And your petitioners further ask that if said appropriation and subscription as prayed herein is granted in all respects, that the same be on the following terms and conditions, to wit: That said company shall be required to construct and complete a standard gauge railway through said Columbus township, on or before the 1st day of June, 1882, and shall erect a depot within the corporate limits of the city of Columbus, and shall pass a train of cars over said railway, within said Columbus township, before said 1st day of June, 1882, and before any part of said money shall be so appropriated and subscribed to the stock of said railway company, and your petitioners will ever pray."

Proper proceedings were had upon this petition, proper notices given, and an election was held in the township on the 3d day of April, 1880, which resulted in favor of the appropriation. A proper return of the election was made, but the board of commissioners did not make a levy of a special tax at the ensuing June session, 1880. At the June session 1881, on the 16th day of June, a tax of one per centum, on the taxable property of the township, was levied for the year 1881, and was properly put upon the duplicate of that year by the auditor of the county, to be collected and applied for the purpose of meeting the appropriation as prayed for and voted.

The railroad company has acquired no right of way in the township or county, has not constructed, or made any efforts to construct, any part of its road in the township, county or State; nor has it erected a depot within the corporate limits of the city of Columbus. On the 13th day of January, 1882, the board of commissioners of the county, in lawful session, made an order directing the auditor and treasurer of the county to suspend the collection of the tax so levied until further orders from the board. At the June session, 1882, of the

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board, the railroad company filed a petition with the board of commissioners, recognizing the conditions upon which the appropriation was voted, admitting its inability to comply with such conditions, and asking that the time be extended for one year. Upon the filing of this petition, the board made an order reciting the conditions, and the failure of the railroad company to comply with them, and that it had thereby forfeited all right to the appropriation so voted, and that the time should not be extended. This order has not been appealed from. At the March session, 1882, of the board, a properly drawn and signed petition was presented to the board of commissioners of Bartholomew county, asking for an appropriation of \$70,000 by Columbus township, in said county, to aid in the construction of the Columbus, Hope and Greensburg Railroad, and the taking of that amount of the stock of said company. An election was ordered by the board, proper notices were afterwards given, and the election was held on the 22d day of April, 1882. The notices stated the object of the election, as stated in the petition and order. At this time, the township was divided into the following voting precincts, viz.: Northeast precinct, northwest precinct, south precinct, east city precinct and west city precinct. The division of the township into precincts, as made by the board of commissioners, shows that the court-house, in the city of Columbus, is the voting place of the northwest precinct, and is in that precinct. The poll-book at the east city precinct has the following heading: "A poll-book of an election held at east city precinct, in city of Columbus, in Bartholomew county, and State of Indiana, April 22d, 1882, for the purpose of voting aid for the C., H. & G. Railroad appropriation."

The certificate of the board of judges is as follows:
"THE STATE OF INDIANA, BARTHOLOMEW COUNTY:

"We, the undersigned board of judges of an election, held at east city precinct, in Columbus township, in Bartholomew county, and State of Indiana, on the 22d day of April, 1882, for the purpose of voting for an appropriation for the Columbus,

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Hope and Greensburg Railroad, certify that the following votes were cast:

"JAMES HOFER, Inspector.		HENRY KOBBE,	} Judges.
"THOS. F. WARNER, Clerk.		L. G. REDMAN,	

"For appropriation 220 votes.

"Against appropriation 57 votes."

Following the evidence in relation to the east city precinct, *supra*, it is stated in the bill of exceptions that appellees introduced in evidence the poll-books and certificates returned to the auditor's office of Bartholomew county, and on file therein, of the northwest precinct, the south precinct, the northeast precinct, and the west city precinct, all in Columbus township, being all of the voting precincts in said township, of the vote taken on the appropriation on the 22d day of April, 1882.

Here follows the poll-books, the votes and certificates of the votes in the south precinct, the northeast precinct, the west city precinct, and the poll-book and certificate of an election held at the court-house in precinct called number one.

The poll-book and certificate for the south precinct show an election for the purpose of voting for and against "the railroad appropriation." The name of the railroad company is not given. In the heading of the poll-book for the northeast precinct, it is stated that the election was held for the purpose of voting for the appropriation of two per cent. tax, of the taxable property of the precinct, for the construction of the Columbus, Hope and Greensburg Railroad. In the certificate of the board of judges, the same language is used.

In the heading of the poll-book for the west city precinct, it is stated that the election was held for the purpose of voting for or against constructing a railroad from Columbus to Greensburg, Decatur county, Indiana, "appropriating \$70,000 for said purpose, or against said appropriation." In the certificate of the board of judges, it is stated that the election was held "for the purpose of voting for the railroad appropriation, and against the railroad appropriation."

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On the 27th day of April, the board of canvassers met, canvassed the vote of the township, and made the proper return, which states correctly each of the precincts in the township by name, and the number of votes in each, for and against the appropriation, and shows a majority of 292 votes in the township in favor of the appropriation.

The appropriation of \$70,000 did not exceed two per centum of the taxable property of the township on the tax duplicate for the year 1881, and \$35,000 did not exceed one per centum of the taxable property on the duplicate for the year 1882. At the June session, 1882, of the board of commissioners, appellee Lowe, one of the original petitioners, appeared before the board, and, upon written application, asked that a special tax be levied to meet the appropriation so voted.

At the same time appellant, a taxpayer of the township, also appeared before the board, and filed written objections to such levy, and asked that the election be declared illegal and void. These written objections were in three specifications, or paragraphs. The board dismissed the objections, and made an order that one-half of the appropriation, \$35,000, should be levied and placed upon the duplicate of 1882, and the balance upon the duplicate of 1883. From this order appellant appealed to the circuit court. In that court, the case was ordered docketed, with appellant as plaintiff, and appellees, who were the petitioners for the appropriation, as defendants. The written objections filed in the commissioners' court were treated as in the case, and were demurred to by appellees. The demurrer was sustained to the first and third specifications, or paragraphs, and overruled as to the second. To this an answer in two paragraphs was filed, and, after demurrer overruled to the second paragraph, the cause was put at issue, by a reply of general denial. Upon the trial by the court, the facts already stated were established by the evidence. The court found for appellees, and, after motion for a new trial overruled, a judgment was rendered "that the levy made by the board of commissioners be and the same is

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hereby confirmed, and that a tax of one-half of said appropriation, so asked as aforesaid, to wit, the sum of \$35,000, be and the same is hereby levied upon the real and personal property in said township, to be collected *pro rata* upon the same, and the auditor of Bartholomew county is ordered and directed to assess and apportion the same against and upon the tax duplicate, as required by law." To this judgment, especially so much of it as orders a levy, appellant excepted. From this judgment appellant prosecutes this appeal. In this court errors are assigned upon the rulings on demurrers, the motion for a new trial, and the rendition of the judgment.

The third paragraph of the objections was intended to challenge the regularity and validity of the election, on account of irregularities in poll-books, certificates, etc. All of the material questions raised by that paragraph are presented by the evidence and the motion for a new trial. Does the record present such irregularities in the election as renders the election void? The informalities and irregularities urged by counsel for appellant are apparent from what has been stated in relation to the election in the several precincts. Counsel urge some irregularities which do not exist in fact.

The irregularities in the east city precinct, which counsel claim rendered the election invalid, are, that in the heading of the poll-book the railroad is named as the C., H. & G. Railroad, and that the number of votes follows the signatures of the election officers, and is given in figures and not written out in words.

It will be noticed, upon examination, that the correct and full name of the railroad is given in the certificate. It is apparent that the election board and voters knew for what railroad the aid was voted. They were informed of this by the notice given of the election. For this reason the law requires that the ballots cast for the appropriation shall have upon them the words simply "for the appropriation," and those cast against it shall have upon them the words "against the ap-

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propriation." The certificate would be more formal, and possibly better, if the number of votes cast for and against the appropriation preceded the names of the election officers; but this informality is simply an informality that does not affect substantial rights or cast a doubt upon the question of the number of votes actually cast for and against the appropriation. Section 4051, R. S. 1881, requires that the number of votes shall be stated in words, but this is directory simply. Many similar statutes have been held directory. See *Hopper v. Lucas*, 86 Ind. 43.

The irregularity in the south precinct is, that, in the poll-book and certificate, the name of the railroad company is not given. The statement is that the election was held for the purpose of voting for and against *the* railroad appropriation. The name of the railroad company for which aid was being voted was known by the voters and election officers. There was no election on that day to vote aid to any railroad company other than the one named in the notice. Like irregularities are apparent in other precincts, but what we have said will apply to them, and they need not be further noticed. In one of the poll-books and the certificate, it is stated that the election was held at the court-house, in precinct number one. The division of the township into voting precincts shows that the court-house is in, and is the voting place of, the northwest precinct. The board of canvassers name the northwest precinct, and make no mention of "precinct number one." It is very apparent that the naming of the precinct on the poll-book as number one is a mere clerical mistake, and that the votes stated in the certificate are those cast in the northwest precinct. The statute requires that the election for such an appropriation, and the manner of certifying the votes, etc., shall be conducted as nearly as may be in the manner provided by law for conducting general elections, etc. Section 4048, R. S. 1881. While it is true that statutes, which enable the majority to coerce the minority into the payment of taxes to meet such an appropriation, should be strictly

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construed, this rule does not require that such appropriation shall be overthrown upon technical irregularities that do not affect substantial rights.

If the election in a case like this is to be governed by the law in relation to general elections, it would seem to follow that technical irregularities, which will not overthrow the result in one case, will not in the other. The irregularities urged in this case are not such, we think, as should be allowed to overthrow the election.

No charge is made in the written objections, or in argument, that the election was not fairly and intelligently conducted, or that the appropriation was not carried by a majority of the votes cast. Upon the question of such irregularities, see section 4757, R. S. 1881; *Lafayette, etc., R. R. Co. v. Geiger*, 34 Ind. 185; *Mustard v. Hoppess*, 69 Ind. 324; *Bittinger v. Bell*, 65 Ind. 445; *Faris v. Reynolds*, 70 Ind. 359; *Gass v. State, ex rel.*, 34 Ind. 425; *Dobyns v. Weadon*, 50 Ind. 298.

As we have before said, the issue for trial was made upon the second paragraph of the objections. This paragraph sets up the appropriation voted to the Evansville, Seymour and Bellefontaine Railroad Company on the 3d day of April, 1880, and the levy of the tax to meet it, as shown by the record, in June, 1881. There is an averment in this paragraph, that the amount voted to the Evansville, Seymour and Bellefontaine Railroad Company equalled two per centum of the taxable property of the township, as shown upon the tax duplicate for the year 1879. There is no averment as to the amount of the taxable property of the township for the years subsequent to that. The position of counsel for appellant is, that the appropriation voted to the Evansville, Seymour and Bellefontaine Railroad Company equalled two per centum of the taxable property of the township, and that the power to make further appropriation was exhausted, until the collection of tax to meet that appropriation; that as the tax was levied on the 16th day of June, at the June session, 1881, the railroad company had, under sections 4069 and 4094, R. S. 1881, two

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years from that time within which to commence work, and that the condition in the petition, that the company should complete its road through the township, and erect its depots in Columbus, on or before the first day of June, 1882, is in conflict with the law, and void. In this we do not agree with the learned counsel.

Section 4045, R. S. 1881, provides that the petition presented to the board of commissioners asking for an appropriation to aid in the construction of a railroad may contain conditions upon which such aid shall be voted and given. The language of the section upon that subject is: "and upon the terms and conditions as to freights, rates, location of machine shops, depots, and such other terms and conditions as may be specified in such petition." Section 4058, R. S. 1881, has reference to what may be done after the tax shall have been collected, in whole or in part, and provides that, in making donations or taking stock, the board of commissioners shall make a contract with such railroad company, as to freight rates, location of machine shops, depots, and such terms as may have been specified and set forth in the petition upon which such moneys were voted, and that such contract may be enforced by any taxpayer, etc. It is argued by counsel that because such a contract must follow the levy of the tax, because a taxpayer may enforce it, and because a condition in relation to the time within which the railroad shall be constructed could not be embodied in such a contract, therefore such a condition can not be embodied in the petition so as to become binding upon the railroad company, or any one else. In other words, that no binding condition can be embodied in the petition, which, in the nature of things, may not be embraced in such contract by the board of commissioners. We do not think that this is the proper construction of the two sections. Section 4045 names certain conditions, which are also named in section 4058. These conditions have reference to matters which concern the permanent location and operation of the road, and the buildings and business con-

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nected therewith ; but section 4045 expressly authorizes other conditions to be inserted in the petition, which are not named in section 4058. We can think of no condition more fitting and necessary than the condition in the petition for aid to the Evansville, Seymour and Bellefontaine Railroad Company, viz., that the railroad shall be constructed through the township, within a certain fixed time.

Section 4045 is an amendment of an amendment of section 1 of the act of 1869 (Acts 1869, p. 92). As the section originally stood, there was no provision in it authorizing aid to be voted upon conditions named in the petition. This original section was amended in 1875 (Acts 1875, Spec. Sess., p. 70), but this amendment contained no provision upon the subject of conditions in the petition.

This amended section was amended in 1879 (Acts 1879, p. 46), and the provision inserted. The history of the legislation upon this subject shows that the law-makers appreciated the necessity for such provisions. In many cases, aid had been voted to railroad companies but the roads had not been built. The condition that the railroad shall be built within a limited time is different from any of the matters enumerated in section 4058, comes fairly within the provision "and such other terms and conditions as may be specified in such petition," in section 4045, and is, we think, valid and binding. It is argued further, that as other sections of the law give to railroad companies certain time after the levy of the tax, within which to commence and complete the construction of their roads, this time can not be abridged by any conditions in the petition.

As we understand these aid laws, construing all of the sections together as we find them in the R. S. 1881, they fix and limit the time within which, after the appropriation, the railroad company shall commence and complete the construction of its road to be entitled to the appropriation, except where such time is fixed and limited in the petition under section 4045 ; and that when such time is so fixed in the petition, as a condition to the granting of the aid, the vote is taken upon

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such condition, and it is valid and binding upon the voters, the board of commissioners in the subsequent proceedings, and upon all others. We do not regard this as entirely a new question in this court.

In the case of *Faris v. Reynolds*, *supra*, which arose under section 1 of the act of 1869, before it was amended, it was held that the petitioners might designate in their petition whether the aid voted should be by way of donation or for stock of the railroad company, and that whichever object might be designated by the petition and vote of the people, was binding upon the board of commissioners and all others. The case of *Brocaw v. Board, etc.*, 73 Ind. 543, is, in some of its features, very similar to the case in hearing, and is authority. In that case it was claimed that a condition in the petition was not warranted by the law. The condition was that the railroad company should complete a certain portion of its road within a given, limited time, and that the appropriation should be made upon such condition. This condition was held to be not in conflict with any provision of the law, and valid and binding.

The voters of Columbus township voted the aid to the Evansville, Seymour and Bellefontaine Railroad Company upon the condition expressed in the petition, and not otherwise. If, as contended by appellant's counsel, the conditions were in violation of law, it would seem to follow that the whole proceedings and appropriation were illegal and void, and hence not in the way of the aid to the Columbus, Hope and Greensburg Railroad Company. *Indiana, etc., R. W. Co. v. City of Attica*, 56 Ind. 476.

As we have seen, one of the conditions in the petition for aid to the Evansville, Seymour and Bellefontaine Railroad Company was that the company should construct and complete a standard gauge railway through the township, and pass a train of cars over it before the 1st day of June, 1882.

This condition has not been performed in whole or in part by that company; on the contrary, it has no right of way in

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the township or county, and has not constructed, or made any effort to construct, any part of its road in the township, county or State, has admitted its inability to comply with such conditions, and asked for an extension of time, which was refused by the board of commissioners.

On account of this failure to comply with the conditions we think that the vote in 1880, and the levy in 1881, in favor of the Evansville, Seymour and Bellefontaine Railroad Company, are not in the way of the appropriation made in aid of the Columbus, Hope and Greensburg Railroad Company in 1882. We think, too, that the Evansville, Seymour and Bellefontaine Railroad Company forfeited all rights to the appropriation voted to it, under section 4062, R. S. 1881, which declares such forfeiture if work be not commenced upon the railroad within one year from the levying of the special tax. Having reached the conclusion stated, upon the grounds stated, it will not be necessary for us to give a construction to sections 4069 and 4094, R. S. 1881. We may say, however, without deciding, that we are inclined to the opinion that section 4094 relates to corporations organized at the time that section, which was section 1 of the act of 1877, was passed. What may be the proper construction of section 4069, in connection with other sections of the acts authorizing township aid to railroad companies, it is not necessary for us to decide under the issues and facts in this case.

Appellant's case, upon the point under consideration, is infirm also, in the proof, as we think. There is no proof at all as to the amount of the taxable property of the township for either of the years 1879, 1880, 1881 or 1882. For aught that appears in the evidence, the value of the taxable property may have been such that the appropriations to both railroad companies might have been made without transcending the limit fixed by sections 4045, 4056 and 4057, R. S. 1881.

The record shows that at the June term, 1881, the board of commissioners levied a special tax of one per centum upon the taxable property of the township, to meet the appropria-

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tion voted to the Evansville, Seymour and Bellefontaine Railroad Company. What the value of the taxable property of the township for that year was, or whether a tax of one per centum would produce a sufficient sum to meet the entire appropriation, is not shown. In the order of the board of commissioners levying the special tax at the June session, 1882, to meet the \$70,000 appropriation to the Columbus, Hope and Greensburg Railroad Company, there is a statement that the amount exceeded one per centum of the value of the taxable property of the township, as shown by the tax duplicate for the year 1881. There is also an admission in the record, taken as evidence, that the \$70,000 did not exceed two per centum of the value of the taxable property of the township, upon the duplicate for the year 1881, and that one per centum of that value would produce \$35,000. This is all there is in the record to show directly or indirectly the value of the taxable property of the township. How much the \$70,000 exceeded one per centum, or how far it fell short of two per centum, or how much more than \$35,000 a tax of one per centum would produce, is not shown.

Complaint is made of the ruling of the court below in sustaining a demurrer to the first paragraph of the objections filed by appellant. The substance of that paragraph is that the city of Columbus, in Columbus township, is in debt to the amount of two per centum of the taxable property in the city, the limit fixed by article 13 of the Constitution of the State, and that the \$70,000 appropriation will increase the debt of the city beyond that limit, and that, therefore, the appropriation can not be made.

This objection is not tenable. The city is an integral part of the township, but it is not the township, nor is the township the city. They are distinct corporations, with distinct powers, privileges and rights. The debt of the township, which includes the city within its limits, is not the debt of the city in the sense in which that term is used in the 13th article of the Constitution. Objections are made by appellant's coun-

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sel in argument, that there is no evidence showing that the Columbus, Hope and Greensburg Railroad has been permanently located in the township, or that any work has been done upon it. These questions are not before us. They were not made before the board of commissioners, and were not and could not have been made under the issues in the court below. The case stood for trial in the court below upon the objections made before the commissioners, and none others. *Breitweiser v. Fuhrman*, 88 Ind. 28; *Peed v. Brenneman, ante*, p. 252.

A further objection is made by appellant's counsel to the form of the judgment rendered by the court below. The whole of the argument is: "The question thus reserved is whether the circuit court takes control of the matter, or whether it should be remitted to the county commissioners. The judgment of the court is respectfully asked to this alleged error."

This does not comply with the rules of this court in relation to briefs. We may add, however, that we think there is no available error. *Mandlove v. Pavy*, 33 Ind. 505; *Gavin v. Board, etc.*, 81 Ind. 480, 485.

As we find no error in the record for which the judgment should be reversed, it is affirmed, at the costs of appellant.

No. 10,662.

WATKINS v. DE ARMOND.

PLEADING.—*Implied Promise.*—A complaint, alleging facts from which the law will imply a promise, though it fail to aver the promise, will resist a demurrer.

HUSBAND AND WIFE.—*Husband's Liability for Necessaries for Wife and Children.*—*Implied Promise.*—When a husband by cruelty drives his wife and infant children from his house, without means of support, and the wife's father furnishes them necessaries, the latter may recover on an implied promise of the husband to pay, though the husband has given notice that he would not be responsible.

From the Superior Court of Vanderburgh County.

Watkins v. De Armond.

C. A. Buskirk, for appellant.

H. A. Yeager, for appellee.

ELLIOTT, J.—It is alleged in appellee's complaint, that appellant, by his cruel treatment, drove his wife and infant children from his home, and left them without the necessaries of life; that the appellee received them into his house and supplied them with food, clothing and other necessaries, and that the appellant is indebted to him for such necessaries in the sum of \$1,000.

Where a complaint states such facts as raise an implied promise it is good, although it does not in terms aver that there was a promise. Where the facts are properly pleaded from which the law implies a promise, the courts will apply the law and make the proper inference. Pomeroy Remedies (2d ed.), p. 560, *n*; *Wills v. Wills*, 34 Ind. 106. Under the code, facts, and not mere conclusions, should be pleaded. If, however, appellant were right in affirming that the complaint should state the conclusion deducible from the facts, it is done in the allegation that "the defendant is indebted to the plaintiff, and all of which is due from the defendant to the plaintiff." We are not disposed, however, to attach much importance to the statement of mere conclusions; it is not from them, but from the facts, that pleadings are to be judged.

A man who forces his wife and children from his home by inhuman treatment is legally bound to one who supplies the wife with necessaries, and if it were conceded that the complaint was bad in so far as it makes claim for necessaries furnished the children, it would still repel a demurrer; for a complaint good as to part of the relief demanded will withstand a demurrer. *Bayless v. Glenn*, 72 Ind. 5.

It is shown by the evidence that the appellee is the father of appellant's wife, and it is insisted that this relationship precludes a recovery, for the reason that a father can not recover from his daughter's husband for necessities furnished her after she had been driven by cruelty from the husband's house. We

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can not sanction any such a doctrine. If the father provides a daughter thus expelled from her husband's home with necessaries, he has as much right to maintain an action as anybody else. We are clear that the appellant is bound to pay for the necessities furnished his infant children. There may possibly be cases where the father's duty is a mere moral one, but there are cases where the duty is a legal one. Where the children are of such tender age as to require a mother's care, and to be incapable of doing work, and the father drives the mother and children from his home, and another gives them the care necessary to maintain them, the husband may be held for the reasonable value of the necessities furnished. Schouler Dm. Rel. 328, n. It would be monstrous to permit a father to thrust his children of helpless age from his doors and escape all responsibility for necessities furnished them.

A man under a duty to supply his wife with necessities, and who fails to perform it, can not escape liability to one who does furnish her with necessities, upon the ground that he gave notice that he would not be responsible for them. To permit this would be to put it in the power of bad husbands to deprive their wives of all means of living; for, if notice terminated liability, the man bad enough to beat his wife would be swift to give it.

In one of the answers to interrogatories, the jury say that there was no contract, and from this it is argued that there can be no recovery, because this is a finding that there is neither an express nor an implied contract. The single answer standing alone might, perhaps, sustain appellant's contention; but, when taken in connection with other answers, the meaning of the jury is plain. It is perfectly evident that they meant by the term contract an express agreement. They understood the term as meaning an agreement in terms, and this is a very common signification given the word contract. It was not intended to mean that there was no promise implied by law. Answers to interrogatories are to be taken together, and not separately.

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Taking all the answers in this case into consideration, they entitle the appellee to a judgment, and, so far from being hostile to the general verdict, are in full harmony with it.

Judgment affirmed.

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No. 9338.

STUMPH v. BRUNER ET UX.

FRAUDULENT CONVEYANCE.—*Subsequent Creditors.*—*Trusts.*—*Presumption.*—

A conveyance to defraud existing creditors, but without any secret trust or any intent to defraud subsequent ones, taken by the debtor to another, can not be held fraudulent at the suit of the latter, under section 2975, R. S. 1881.

From the Superior Court of Marion County.

D. V. Burns and C. S. Denny, for appellant.

R. O. Hawkins, P. Norton and C. F. Rooker, for appellees.

BLACK, C.—The appellant sued the appellees, John Bruner and Caroline Bruner, his wife, to subject to sale certain real estate in Marion county, the legal title to which was in said Caroline, to satisfy a judgment rendered against her said husband in favor of one Minerva Carter, and assigned by her to the appellant.

Issues were formed, and the cause was submitted for trial to the court. The court stated in writing the facts and the conclusions of law upon them, and judgment was entered accordingly, which, on appeal to the general term, was affirmed.

The question to be decided here is whether the court erred in its conclusions of law upon the facts found.

The special finding was as follows:

“The court, having been requested by the plaintiff to find specially the facts and conclusions of law herein, finds the following to be the material facts: On February 15th, 1868, the defendant John Bruner, who was then and ever since has been the husband of his codefendant, Caroline Bruner, became

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indebted jointly with one Spiegelworth to one Julia Brennan, as evidenced by certain notes executed on said last mentioned date. Being still indebted to said Julia Brennan upon the indebtedness aforesaid; the said John Bruner, on February 14th, 1870, purchased, with his own means (the said Caroline paying no part of the consideration), of one Mitchell the real estate in controversy, which is the same more particularly described in the plaintiff's complaint herein; and for the purpose of hindering, delaying and defrauding the said Julia Brennan in the collection of her said claim against him, he, the said John Bruner, procured the said Mitchell to convey said real estate to his wife, the defendant Caroline Bruner, who had notice when she accepted said conveyance of the fraudulent intent of her said husband, he, the said John Bruner, not then and not since having any other property out of which said claim of said Julia Brennan could be made.

"On June 21st, 1870, the said Julia Brennan recovered a judgment against said John Bruner in the Marion Civil Circuit Court, upon the notes before mentioned, and afterwards, to wit, on January 21st, 1873, she began in said court an action to have said conveyance by said Mitchell to said Caroline Bruner declared fraudulent, and to subject the real estate aforesaid to the payment of her said judgment, and such proceedings were had in said action, that, on November 1st, 1873, the said court rendered a finding and judgment therein, in which it was, among other things, found and adjudged that the said John Bruner had procured the title to said real estate to be conveyed to his wife, the said Caroline, for the purpose of hindering, delaying and defrauding his creditors, of which she, the said Caroline, had notice at the time when she accepted said conveyance, that the said real estate was subject to sale on execution, as the property of said John Bruner, to satisfy the said judgment of said Julia Brennan, and that the title of said Caroline in and to said real estate, in so far as the same was an obstruction to the collection of said judgment, should be set aside and held for naught.

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"Upon said last mentioned judgment in favor of Julia Brennan aforesaid, said real estate was sold, but the defendant Caroline Bruner afterwards redeemed the same by payment in full of said Julia Brennan's judgment and costs, for the satisfaction of which said sale was ordered and made; and she, the said Caroline, has ever since held, and still holds, the legal title to said real estate.

"On April 2d, 1874, one Minerva E. Carter began an action in this court against the said John Bruner, wherein she claimed damages by reason of the alleged wrongful sales by him to her husband, beginning about six months prior to the commencement of said action and continuing up to the said commencement thereof, contrary to the provisions of an act of the General Assembly, entitled 'An act to regulate the sale of intoxicating liquors,' etc., approved February 27th, 1873; in which said action the said Minerva E. Carter, on the 28th of September, 1874, recovered judgment against said John Bruner for the sum of \$1,000; that afterwards, and before the commencement of this action, the said Minerva E. Carter sold and assigned her said judgment to this plaintiff, John B. Stumph, who is still the owner thereof.

"By the said conveyance, hereinbefore mentioned, by said Mitchell to said defendant Caroline Bruner, it was not intended by either the said John Bruner, the said Mitchell, or the said Caroline Bruner, to hinder, delay or defraud any subsequent creditors of said John Bruner, or any of his existing creditors other than the said Julia Brennan; and when said conveyance was made, the claim of said Minerva E. Carter was not in existence or contemplated by any of the said parties.

"Upon the foregoing facts the court finds and states the following conclusions of law: That the facts hereinbefore found are not sufficient to constitute a cause of action, or to entitle the plaintiff to any relief whatever, as against the defendant Caroline Bruner."

It was sought in this proceeding to subject the real estate

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in question to sale under the provisions of the sixth and seventh sections of the statute concerning trusts and powers. 1 R. S. 1876, p. 915. By said section 6 it is provided that "When a conveyance, for a valuable consideration, is made to one person, and the consideration therefor paid by another, no use or trust shall result in favor of the latter; but the title shall vest in the former, subject to the provisions of the next two sections."

Section 7 provides that "Every such conveyance shall be presumed fraudulent, as against the creditors of the person paying the consideration therefor, and where a fraudulent intent is not disproved, a trust shall, in all cases, result in favor of prior creditors, to the extent of their just demands; and also in favor of subsequent creditors, if there be sufficient evidence of fraudulent intent."

A distinction is here expressly made between prior and subsequent creditors.

In *Winn v. Barnett*, 31 Miss. 653, it was said: "It is true, that it has been held in some cases, that where a conveyance by a debtor was fraudulent in its inception as to his creditors at the time, it will be so treated as to subsequent creditors. But these cases must rest upon one of two principles, the property was either so situated that it enabled the debtor to obtain credit upon the faith of it, or the fraudulent vendee was regarded as a trustee under the secret arrangement between the parties, and in virtue of such secret understanding, bound at least so far as his word or such contract could bind him, to account to the fraudulent vendor. * * In the present case, however, it is neither shown that the debts were contracted upon the faith of the property, nor that the defendant was in any manner a trustee for, or accountable to, her husband." See, also, *Keeler v. Ullrich*, 32 Mich. 88; *Kane v. Roberts*, 40 Md. 590; *Converse v. Hartley*, 31 Conn. 372; *Kid v. Mitchell*, 1 Nott & McCord, 334 (9 Am. Dec. 702); *Hall v. Sands*, 52 Me. 355; *Shand v. Hanley*, 71 N. Y. 319; *Bump Fraud. Conveyances*, 319.

In *Clark v. French*, 23 Maine, 221, it was said: "If a deed

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be made, which is intended to be absolute, without the reservation of any secret trust for the benefit of the vendor, although made with a fraudulent intent, well understood and intended, by both parties, to place the property beyond the reach of creditors, and although made for a valuable consideration, yet, wanting the other ingredient, viz. good faith, it shall be avoided only by creditors existing at the time. * * Some of the seeming discrepancy in the authorities may have arisen from not discriminating between the different kinds of fraudulent conveyances, and the different degrees and shades of fraud in each. For some a valuable and adequate consideration is paid, and actual possession delivered and retained, yet they are made with a view to aid the debtor to convert his property into that, which can not be attached or levied upon, and so to aid him in placing it beyond the reach of creditors. But being covinous such conveyances may be avoided by creditors, who were such at the time, but not by subsequent creditors; for there will be no secret trust, in such cases, for the benefit of the vendor."

Whether a voluntary conveyance is fraudulent as to subsequent creditors, is a question that is to be determined from all the circumstances of the transaction. *Bump Fraud. Convey.* 314. In *Lynch v. Raleigh*, 3 Ind. 273, the court considered as of importance the question whether the conveyance was made with a view to defraud subsequent creditors, who alone were attacking it, though it was established that the conveyance had been made to defraud an existing creditor, and said that, supposing it to be sufficiently proved that the purchaser knew that his vendor's object in selling to him was to avoid the payment of a certain existing debt, though the land might perhaps be subjected to the payment of that debt, "it would not follow that the conveyance would be voidable for debts subsequently contracted."

Where prior creditors attack a conveyance such as that here under examination, it must, under the statute, be held fraudulent, unless fraudulent intent be disproved. It is clear, un-

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der the authorities, that if, in a particular case, fraud against prior creditors should be thus established only by presumption, this would not be sufficient proof of fraud against subsequent creditors. And yet the fraud would be none the less such because presumed instead of proved. Suppose that, in a suit brought by subsequent creditors alone, fraud as against prior creditors alone be proved, and not merely presumed, is it contemplated by the statute that this shall necessarily, in all cases, establish fraud, as against the subsequent creditors?

It seems that the fraudulent intent should relate to or affect subsequent creditors, and the burden of proving the necessary ingredients of the fraud is placed upon the subsequent creditors. Where it is not simply a case of subsequent creditors seeking to share with prior creditors in the proceeds, but the case is, as here, that of a subsequent creditor alone seeking to invalidate the conveyance, and subject the land to sale for his benefit, the prior creditor, to defraud whom alone the conveyance was made, having been paid by the grantee, the plaintiff should show that the conveyance was a continuing fraud, and not rely solely on the fact that it was made to defraud the prior creditor.

The statute fixes the title in the grantee free from any trust in favor of the person paying the purchase-money. No secret arrangement by which the grantee was to hold the real estate for her husband is stated, and it does not appear that the appellant or his assignor became a creditor of the husband, relying on this property. Indeed, it appears that the judgment of appellant's assignor was rendered upon a statutory cause of action, the statute by which the right of action was given having been enacted three years after the conveyance in question.

While it is found that the conveyance was made and received with intent to hinder, delay and defraud an existing creditor, whose claim has since been paid by the appellee Caroline, the grantee, it is expressly found that it was not made

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with a fraudulent intent as to any other creditor, prior or subsequent, and that the claim set up in this action was not then in existence or contemplated, and that it was of such a nature that it could not then have been contemplated by any of the parties to the transaction.

The question of intent to defraud subsequent creditors is made by the statute a different question from that of an intent to defraud prior creditors. Proof of an intent to defraud prior creditors may be evidence of the same intent as to subsequent creditors; but here it is found as a matter of fact that such intent did not exist as to subsequent creditors.

Upon the facts found we do not see how the court could have stated conclusions of law in favor of the appellant.

We think the judgment should be affirmed.

PER CURIAM.—Upon the foregoing opinion, it is ordered, ELLIOTT, J., taking no part, that the judgment be and it hereby is affirmed, at appellant's costs.

Opinion filed at the May term, 1882.

Petition for a rehearing overruled at the May term, 1883.

No. 9598.

COLLINS v. McDUFFIE.

REAL ESTATE, ACTION TO RECOVER.—*Cross Complaint.*—A cross complaint, filed by a defendant in an action for the recovery of real estate, averring his ownership of the property, that the plaintiff asserts title thereto, but has none, is sufficient on demurrer.

SUPREME COURT.—*Brief.—Special Finding.*—The Supreme Court will not, upon a mere general statement in the brief of counsel that a special finding does not support the conclusions of law, consider whether or not the conclusions of law are erroneous.

From the Hancock Circuit Court.

*J. H. Mellett, B. F. Davis and J. L. Mason, for appellant.
C. G. Offutt, for appellee.*

ELLIOTT, J.—The appellant's complaint seeks the recovery

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of land, and claims that he owns it in fee. The cross complaint of the appellee, in one paragraph, at least, asserts that she is the owner in fee, and prays that her title may be quieted.

A cross complaint which shows the cross complainant to be the owner in fee simple of the real estate in controversy, and that the plaintiff asserts title thereto, but has none, is good on demurrer.

Tested by the rule just stated, the second paragraph of the appellee's cross complaint is sufficient, and as the demurrer is addressed to the whole cross complaint, it was properly overruled, although the third paragraph may be insufficient.

Where a party seeks a reversal upon the ground that the special finding of facts is insufficient to support the conclusions of law stated by the court, he must, in his brief, point out the reasons why the conclusions of law are erroneous. This court will not act upon a mere general statement of counsel that the finding does not support the conclusions.

Judgment affirmed.

No. 10,313.

RODEFER v. FLETCHER ET AL.

PRACTICE.—Causes for New Trial.—Verdict or Finding.—Judgment.—Under the sixth clause of section 559, R. S. 1881, the causes for a new trial therein mentioned are predicated upon the verdict of the jury, or the decision in the sense of finding of the court, and not upon the judgment.

From the Clinton Circuit Court.

C. S. Wesner, for appellant.

Hawk, J.—This was a suit by the appellant against the appellee Fletcher, as the assignor of a promissory note. Appellee answered the appellant's complaint by a general denial thereof. The issues joined were tried by the court, and a finding was made for the appellee, the defendant below, and judgment was rendered accordingly. Appellant's motion for a new trial

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134	574
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138	599
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143	143
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147	306
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150	411
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154	343
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159	677
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163	31
89	563
166	365

Rodefer v. Fletcher et al.

having been overruled, and his exception saved to such ruling, he has appealed from the judgment below to this court.

The only error properly assigned by appellant is the overruling of his motion for a new trial. In this motion the following causes were assigned for such new trial:

"1st. Because the judgment is contrary to law;

"2d. Because the judgment is not supported by the evidence given in the case;

"3d. Because the judgment is contrary to the law and the evidence."

This case was finally disposed of in the circuit court on June 28th, 1881, while the civil code of 1852 was still in force. In the *sixth* clause of section 352 of that code (sec. 559, R. S. 1881,) it is provided that a new trial may be granted when "the verdict or decision is not sustained by sufficient evidence, or is contrary to law." The word *decision*, as used in this clause of the statute, "is clearly used in the sense of finding upon the facts, where the cause is tried by the court." *Wilson v. Vance*, 55 Ind. 394. *Christy v. Smith*, 80 Ind. 573. Possibly, the appellant may have intended to assign as causes for a new trial, in his motion therefor, that the finding or decision was not sustained by sufficient evidence, and was contrary to law. But, if such were his intention, it is evident, from the causes above quoted, that they are not such causes for a new trial as are authorized by the statute.

In *Rosenzweig v. Frazer*, 82 Ind. 342, the same causes were assigned for a new trial, in the same terms, as in the case at bar. The court said: "These are not statutory causes for a new trial. * * * * It is cause for a new trial if the verdict or finding is not sustained by the evidence or is contrary to law, but not so of the judgment. It frequently occurs that, upon verdicts or findings in strict accord with the law and the evidence, judgments contrary to both law and evidence are rendered. But, as has been often decided, the remedy against such errors must be sought through an exception to, or a motion to modify, the judgment."

Vawter v. Bacon.

We are of opinion, therefore, that the appellant's motion for a new trial was not sufficient, either in form or substance, to call in question below the correctness of the court's finding, under the law or upon the evidence; and that the ruling upon such motion presents no question for our decision.

The judgment is affirmed, with costs.

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No. 9968.

VAWTER v. BACON.

CONTRACT.—*Specific Performance.*—As a general rule, one who seeks specific performance must have done all in his power to perform the contract on his part.

SAME.—*Enforcement of Execution.—Equity.*—The specific execution of a contract in equity is a matter, not of absolute right in the party, but of sound discretion in the court; so that a bill may be resisted on much weaker grounds than are necessary for its maintenance.

SAME.—*Reformation of Contract.*—Upon the facts of this case—for which see opinion—

Held, that the court did not err in refusing to reform and specifically enforce the contract between the parties for the sale of realty.

SAME.—*Contract to Execute Promissory Notes.—Special Terms.*—An agreement to execute promissory notes for certain sums does not bind the party to make notes with extraordinary provisions, such as for payment in bank, ten per cent. interest, and attorney's fees.

SAME.—*Agreement to Convey Realty.—Consideration.—Deed.—Rescission.—Waiver.*—If A., who has agreed to convey realty to B. in consideration of the agreement of B. to execute to A. promissory notes for certain sums, payable at certain times, with interest, demands of B. notes drawing ten per cent. interest, payable in bank, and with attorney's fees, and insists on withholding a deed for the realty until such notes shall have been made, B. may treat the contract as rescinded, and does not waive this right by taking possession and making improvements, if A. thereafter continues to withhold the deed and to demand improper notes.

SAME.—*Notice of Election to Rescind.—Escrow.—Agency.*—The agent of A. in such case, appointed to hold the deed and to deliver it only upon a compliance by B. with A.'s wrongful demands, was a proper person to receive notice of B.'s election to treat the agreement as rescinded.

From the Jefferson Circuit Court.

Vawter v. Bacon.

D. Overmyer, T. W. Woollen and D. D. Banta, for appellant.

D. Bacon and T. C. Batchelor, for appellee.

WOODS, C. J.—Action by the appellant for the correction and specific enforcement of a written contract for the sale of real estate.

The contract as signed is of the tenor following: “David G. Vawter has sold the residence formerly owned by James H. Vawter, deceased, and now occupied by John Riley, in the town of Vernon, for the sum of fifteen hundred dollars, three hundred and seventy-five dollars due November 6th, 1879, three hundred and seventy-five dollars due November 6th, 1880, and three hundred and seventy-five dollars in 1881, and three hundred and seventy-five dollars in 1882, interest on all the notes to be paid annually, and making the whole purchase-money \$1,500. Lot No. 1 and 22, of No. 4 south part.

(Signed) DAVID G. VAWTER.

“ DANIEL BACON.

“ FRANKLIN, November 6th, 1878.”

The mistakes alleged in the complaint are, that Bacon was not named in the writing as vendee, the failure to give an accurate description of the property, and the omission of the date “November 6th,” when the notes payable in 1881 and 1882 should become due. It is alleged that the defendant took possession under the agreement, made valuable improvements, and occupied until a day in the year 1879, when he abandoned the possession, and refused to abide by the agreement; that the plaintiff had always been ready and willing to perform, and before bringing the action had tendered the defendant a deed duly executed, and had demanded of him the execution of notes for the purchase-money, etc.

The defendant answered: *First.* A general denial. *Second.* A voluntary and mutual agreement of rescission. *Third.* The facts in detail, to the effect that the memorandum was not intended as evidence of the entire contract, and was know-

Vawter v. Bacon.

ingly and purposely signed as it is, without mistake or unintentional omission; that the agreement as made, which is set out at length, the plaintiff had failed and neglected to perform, and on account of this failure the defendant had elected to abandon the possession, and to treat the contract as rescinded, had tendered back to the plaintiff the keys of the property and a sum of money, which is brought into court, for the use and occupation during the time of his possession.

As no question is made upon the pleadings, a fuller statement of them is unnecessary. The court found upon the evidence for the defendant; the appellant moved for a new trial, insisting that the decision was contrary to the law and to the evidence.

It is evident that the writing, uncorrected and unaided by extrinsic facts, could not be specifically enforced; and, upon the evidence in the record, it can not be said, with certainty, that the court should have ordered a correction of the instrument to supply an unintentional omission, or to correct any mutual mistake. The parties made a parol agreement, which, according to the testimony of the appellee, it was not proposed to reduce to writing, because it was to be fully executed within a few days by the execution of a deed and delivery of possession by the appellant, and the execution of notes and a mortgage for the purchase-money by the appellee; but, shortly after the making of this parol agreement, the appellant himself prepared and signed the memorandum, and sent it, by another, to the appellee for signature, whereupon, without reading it through, he signed it. If, therefore, there is any proof to warrant a correction, it must be on the inference that the parties intended the memorandum to express their parol agreement; and if this inference can be indulged to any extent, it must in fairness be carried to all the terms of the agreement, and for the purposes of this action the memorandum, if corrected at all, should be conformed to the entire contract—the parts favorable to the appellee as well as those relied on by the appellant.

Vawter *v.* Bacon.

The evidence shows a parol contract for the sale of the property by the appellant to the appellee for \$1,500, payable in four annual instalments, with interest, the appellant to convey and deliver possession immediately, and the appellee to make to the appellant promissory notes for the purchase-money, secured by a mortgage upon the property.

The contract was made at Vernon, where the appellee resided, the appellant being a resident of Franklin. The appellant went home, and on the next day, with his wife, signed and acknowledged a deed for the conveyance of the property to the appellee, which he sent to Hiram Read, at Vernon, to be delivered upon the execution by the appellee of four notes and a mortgage, which the appellant sent along with the deed to Read, with strict instructions that the notes must be executed as written, payable at a bank in Franklin, with attorney's fees, with ten per cent. interest after maturity, and without relief from valuation or appraisal laws. The appellee, upon being informed of the terms of the proposed notes, objected to the provisions for payment in bank, for attorney's fees, and ten per cent. interest, and in a conversation with the appellant, on or about the 11th of the month (November, 1878), told him that he would not sign such notes, but would abandon the contract. The appellant requested him to consider the matter further, and insisted that the contract could not be rescinded. A few days thereafter the appellee took possession of the property, and held it until the 10th of March, 1879, when he left it, and offered to surrender the keys to Read as the agent of the appellant, and to pay \$40 for the use of the property, at the same time demanding compensation for repairs made by him upon the property. From the time the appellee took possession the appellant, through his agent Read, continued to insist upon the execution of the notes and mortgage, in the terms in which he had prepared them, and without this refused to deliver the deed.

It is plain that the appellant, in this respect, was in the wrong. His contract, oral or written, corrected or uncor-

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rected, entitled him to promissory notes, plain and simple, without any special or extraordinary provisions, and when he insisted upon the notes which he tendered for execution, as a condition to the delivery of the deed, he committed a breach of the contract.

At this point it is insisted by counsel for the appellant that by entering into possession after being requested to execute these notes, and by continuing in possession for four months, the appellee waived the right to rescind. It may be that this should be regarded as a waiver of the right to rescind, on account of the plaintiff's conduct down to that time, but the count of the plaintiff's conduct before that time, but the plaintiff to perform the contract, and a continued insistence upon a false interpretation of its terms; and, consequently, it became a question of fact for the court, upon all the circumstances, to say whether the defendant was justified in throwing up the possession, and refusing to be bound further.

We can not say that the conclusion reached was wrong. The general rule is that a party who seeks specific performance of a contract must have done all in his power to fulfil the contract on his part. *Mather v. Scoles*, 35 Ind. 1; *O'Kane v. Kiser*, 25 Ind. 168; 1 Story Eq., section 750. The specific execution of a contract in equity is a matter, not of absolute right in the party, but of sound discretion in the court. Hence a bill may be resisted upon much weaker grounds than are necessary for its maintenance; and, though refused a specific performance, a party may still have his remedy at law. 1 Story Eq., section 769.

Some argument has been bestowed upon the question whether or not Read, as the agent of the appellant, had authority to receive the keys of the property from the appellee, and to accept the sum offered for the use of the property, while the appellee was in possession. The inquiry can hardly be important, because it could not relieve the failure of the appellant to show readiness to perform the contract on his part. But, conceding that Read had no authority to consent to a

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rescission, it by no means follows that he was not a proper agent to receive notice of the defendant's election to rescind, on account of his principal's failure and refusal to perform in accordance with the plain meaning of the contract. He was made agent to hold the appellant's deed for delivery to the appellee, upon his compliance with conditions not in the contract, and was also agent to insist upon those conditions. It was a necessary incident of such an agency that he should receive notice for his principal of the appellee's refusal to comply with the improper demand, and of his election to treat the contract as at an end.

Whether or not, under the circumstances, the appellee was entitled to compensation for improvements put upon the property while he was in possession we need not decide. The fact that he had made such improvements was certainly no obstacle to his abandonment of the property and of the contract of purchase, upon the persistent failure and refusal of the appellant to convey in accordance with the agreement.

Judgment affirmed.

Opinion filed at the November term, 1882.

Petition for a rehearing overruled at the May term, 1883.

No. 10,468.

WILLIAMS ET AL. v. THE STATE, EX REL. ROBERTS ET AL.

GUARDIAN AND WARD.—Evidence.—Bond.—Principal and Surety.—The declarations of a guardian, made to his attorney when preparing his reports, are not proper evidence on behalf of his sureties, in a suit upon his bond. **SAME.—Conversion.—Liability of Sureties on Second Bond.**—In a suit against the sureties upon a guardian's second bond, for conversion of the ward's money by the guardian, there can be no recovery unless it be shown that the conversion occurred after the execution of the bond.

SAME.—Judgment Without Relief.—Statute Construed.—The statute, R. S. 1881, sections 577, 578, requires that judgments against sureties on guardians' bonds shall be without relief from appraisement laws.

From the Jackson Circuit Court.

Williams *et al.* v. The State, *ex rel.* Roberts *et al.*

W. K. Marshall and *J. M. Lewis*, for appellants.

C. L. Jewett and *H. E. Jewett*, for appellees.

ELLIOTT, J.—Appellants were sued as sureties on a bond executed in May, 1877, by their principal, Howard Cordell, as guardian of his infant children.

The court refused to permit the appellants to prove declarations made to the attorney who prepared the guardian's report by Howard Cordell, at the time they were prepared, and this ruling is complained of, but, as we think, without cause. Cordell was a party, and his interests were the same as his sureties, and his declarations were not competent, for to hold otherwise would be to adjudge that a party might prove his own declarations to absolve himself from liability.

It is the law that where a second bond is executed the sureties are not liable for money converted by the guardian prior to its execution. *Lowry v. State*, 64 Ind. 421; *State, ex rel., v. Sanders*, 62 Ind. 562. The appellants are correct, therefore, in affirming that the appellee's relators were bound to show a conversion after the execution of the bond sued on.

There is evidence tending to support the finding of the trial court, and we will not disturb it. The reports of a guardian, although not conclusive upon the sureties, constitute evidence sufficiently strong to support a verdict. The jury or court trying the case may act upon the sworn reports made prior to any controversy, and are not bound to accept as true oral testimony of the guardian contradicting them.

We have no doubt that the court did right in embodying in its judgment a provision that the sureties should not be entitled to the benefit of the appraisal laws, R. S. 1881. Sections 577 and 578 are substantial re-enactments of former statutes. 2 R. S. 1876, p. 188, n. c. Section 2460 applies in express terms to bonds of executors and administrators, and can not, even if it is to receive the construction claimed by appellants, be extended to bonds of guardians. The act of 1852, providing that suits on guardians' bonds shall be governed by

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the law regulating suits on bonds of executors and administrators, referred to the laws then in force, at least as to bonds executed prior to 1881, and we must be guided by them, and not by the special statute governing the settlement of decedents' estates. It is a question of grave importance, whether the Legislature can take from those interested in guardians' or executors' bonds the right to enforce their collection without relief from valuation laws, and whether all such acts as those relating to decedents' estates must not in all cases be construed as prospective, and, therefore, as not operating upon bonds executed prior to their enactment. *Bronson v. Kinzie*, 1 How. 311; *McCracken v. Hayward*, 2 How. 608; *Hutchins v. Barnett*, 19 Ind. 15; *Hutchins v. Hanna*, 8 Ind. 533.

Judgment affirmed.

No. 8375.

THE CONTINENTAL LIFE INSURANCE COMPANY v. VOLGER.

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LIFE INSURANCE.—*Mere Relation of Parent and Child Does not Give Child an Insurable Interest in Parent's Life.*—A daughter has not necessarily an interest in her mother's life, and in a suit by her on such a policy, taken by her, she must allege and prove a pecuniary interest in the life of the mother.

From the Vigo Circuit Court.

J. Buchanan and W. Mack, for appellant.

W. Eggleston, E. Reed, J. M. Winters and G. Seidensticker, for appellee.

HAMMOND, J.—Action by the appellee against the appellant in two paragraphs. Issue upon the first paragraph; trial by the court, finding and judgment for the appellee. Both paragraphs of the complaint were based upon a policy of life insurance issued by the appellant to the appellee upon the life of Louise Hesse, mother of the appellee.

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The averments of the complaint, substantially the same in both paragraphs, were in effect as follows: On February 7th, 1870, the appellee insured the life of her mother with the appellant in the sum of \$5,000, and received from the latter a policy, a copy of which is alleged to be filed with each paragraph of the complaint. The appellee was to pay to the appellant as premiums \$349.25 on or before the 7th of February of each year, for fifteen years; and, at the death of said Louise Hesse, the appellant was to pay to the appellee said sum of \$5,000. It is alleged that the policy provided that, after the payment of two or more annual premiums upon said policy, if the appellee made default thereafter in paying any premium, the appellant was to convert the policy into a "paid-up policy," for as many fifteenth parts of the sum insured as there were complete annual premiums paid at the time of the default: *Provided*, That the original policy, issued to the appellee, should be transmitted to, and received by, the appellant, and that application should be made for such conversion into a "paid up policy" within one year after such default. It is averred that, pursuant to said agreement, the appellee paid the full premiums on said policy for seven years, commencing February 7th, 1870, paying in all \$2,444.75; that on February 7th, 1877, she made default and was unable to pay the annual premium then due; that within one year thereafter she surrendered to the appellant her policy and made application for the "paid-up policy" in accordance with the aforesaid agreement, but that the appellant refused to issue to her such paid-up policy, and still refuses, etc.

The relief asked in the first paragraph was a specific performance of the contract to issue a paid-up policy. In the second paragraph there was a prayer for judgment in the sum of \$2,500 for the premiums paid by the appellee on the policy.

The appellant demurred to each paragraph of the complaint for the following causes:

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"1. That there is a defect of parties plaintiffs herein; that Louise Hesse is the real party in interest.

"2. That neither of said paragraphs states facts sufficient to constitute a cause of action.

"3. That the court has no jurisdiction of the person of the defendant in this action.

"4. That the court has no jurisdiction of the subject-matter of this action.

"5. There is a misjoinder of causes of action in the complaint."

The demurrer was overruled as to the first paragraph. The appellant excepted, and has assigned such ruling as error in this court. The demurrer was sustained as to the second paragraph. To this ruling the appellee excepted, and assigns the same as cross error in this court. We think that the complaint was not open to the objection made against it in the first cause of the demurrer. It was alleged in each paragraph of the complaint that the appellee insured the life of her mother; that the policy was payable to the appellee, and that she paid seven annual premiums thereon. Though the policy was payable to the appellee, it may be, if it had been taken out and the premiums paid by her mother, that the latter, as claimed in the first cause of the demurrer, would be the real party in interest, and that in such case the action should have been brought by her. *Provident Life Ins., etc., Co. v. Baum*, 29 Ind. 236. But as the appellee took out the policy and paid the premiums, we think she should be regarded as the real party in interest.

The third and fourth causes of demurrer were not well taken. It was not apparent upon the face of the complaint, that the court did not have jurisdiction of the person of the appellant, or of the subject-matter of the action.

As to the fifth cause of demurrer, it would seem that the appellee could not, in the same action, enforce the specific performance of the contract and also recover back the premiums paid on the policy. Section 278, R. S. 1881. But the ruling

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upon the demurrer for this cause can not be complained of in this court. Section 341, R. S. 1881.

We come now to consider the second cause of demurrer, namely, that neither paragraph of the complaint stated facts sufficient to constitute a cause of action. It will be observed that the complaint does not show that the appellee had, at the time of receiving the policy, or afterwards, any insurable interest in the life of her mother, the assured, unless the fact of the relationship of mother and daughter gave her such interest. The law is well settled that a policy taken by, and payable to, one upon the life of another, in the continuance of whose life the assured has no pecuniary interest, is void, as being against public policy. 3 Kent Com. (11th ed.) 462-3; *Franklin Life Ins. Co. v. Hazzard*, 41 Ind. 116 (13 Am. R. 313); *Franklin Life Ins. Co. v. Sefton*, 53 Ind. 380. The insurable interest in the life of another must be a pecuniary interest. Some of the authorities tend in the direction that near relationship, as between parent and child, is a sufficient foundation upon which to rest an insurable interest. But this view is not sustained by the weight of authority. See *May Ins.*, section 107; *Lord v. Dall*, 12 Mass. 115; S. C., 7 Am. Dec. 38, and note on p. 42, where the decisions upon this question are reviewed. In *Guardian Mutual Life Ins. Co. v. Hogan*, 80 Ill. 35 (22 Am. R. 180), it was held "that the mere relation here of father and son did not constitute an insurable interest in the son in the life of the father, unless the son had a well founded or reasonable expectation of some pecuniary advantage to be derived from the continuance of the life of the father."

In an action like the present, upon a policy taken out by one upon the life of another, the complaint must state facts showing that the assured had an insurable interest in the life of the person insured. In the case last cited, it was held that where the policy is procured by one on his own life for the benefit of another, it is not, in a suit by the beneficiary, necessary to aver an insurable interest; "But," the opinion continues, "a different rule prevails where one procures insurance

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on the life of another. In such case the plaintiff must aver, in his declaration on the policy, that he had an insurable interest in the life insured, and prove the same affirmatively, as part of his case." This view is in harmony with *Provident Life Ins., etc., Co. v. Baum, supra.* In that case the assured had taken out a policy upon his own life and made it payable to his brother, who was the plaintiff. It was there held that the plaintiff did not have to aver or prove an insurable interest in the life of the insured. The court, in the opinion in that case, says: "It can not be questioned that a person has an insurable interest in his own life, and that he may effect such insurance, and appoint any one to receive the money in case of his death during the existence of such policy. It is not for the insurance company, after executing such a contract, and agreeing to the appointment so made, to question the right of such appointee to maintain the action. If there should be any controversy as to the distribution among the heirs of the deceased, of the sum so contracted to be paid, it does not concern the insurers. The appellant" (the insurance company) "contracted with the insured to pay the money to the appellee" (the brother of the insured), "and upon such payment being made, it will be discharged from all responsibility. So far as the insurance company is interested, the contract is effective as an appointment of the appellee to receive the sum insured." But in the case under consideration, by the averments of the complaint, the policy was not taken out by the insured on her own life with the appointment of the appellee to receive from the insurance company the amount insured. It was taken out by the appellee for her own benefit on the life of another, and we think the case falls within the rule which requires the complaint to aver the insurable interest of the plaintiff in the life insured. For failing to make this averment, we are of opinion that each paragraph of the complaint was bad on demurrer for not stating facts sufficient to constitute a cause of action.

We think that the demurrer was properly sustained to the

Brubaker v. The State.

second paragraph of the complaint, and that it should also have been sustained to the first. For this error the judgment will have to be reversed, and it becomes unnecessary, therefore, to consider other alleged errors, assigned by the appellant.

Judgment reversed, at the appellee's costs, with instructions to the court below to sustain the demurrer to the first paragraph of the appellee's complaint, and for further proceedings not inconsistent with this opinion.

No. 9977.

BRUBAKER v. THE STATE.

INTOXICATING LIQUOR.—*Keeping Place where Sold, in Disorderly Manner.*—

Nuisance.—*Proof of.*—*License to Sell.*—In a prosecution under section 17, act of 1875, 1 R. S. 1876, p. 869, for keeping a liquor shop in a disorderly manner, where the information alleges that the defendant was licensed, proof of the license is necessary to conviction.

From the Huntington Circuit Court.

B. M. Cobb and B. F. Ibach, for appellant.

D. P. Baldwin, Attorney General, C. W. Watkins, Prosecuting Attorney, M. L. Spencer and W. H. Trammel, for the State.

ZOLLARS, J.—Appellant was tried and convicted under the seventeenth section of the act of March 17th, 1875, 1 R. S. 1876, p. 869.

That section provides, that "Every place, house, arbor, room or shed, wherein spiritous, vinous or malt liquors are sold, bartered, or given away, or suffered to be drank, if kept in a disorderly manner, shall be deemed a common nuisance, and the keeper thereof, upon conviction, shall forfeit his license and be fined in any sum not less than ten nor more than one hundred dollars," etc.

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The affidavit, which the information followed substantially in its statements, and upon which it is based, is as follows, omitting the caption:

"Charles H. Willets, being duly sworn, on his oath says, that one Thomas Brubaker, on the 22d day of July, 1881, at said county and State aforesaid, did then and there, and on divers other days and times from said time continuously up to the time of making this presentment, he being then and there during all of said times licensed to sell spiritous, vinous and malt liquors in less quantities than a quart at a time, to be drank on the premises where so sold, bargained and given away in a certain saloon building then and there situate, more particularly described as follows: the building on lot number 18, in Snowden's addition to the town of Antioch, in Huntington county, Indiana, according to the provisions of an act of the Legislature of said State, approved March 17th, 1875, did then and there, during all of said times, unlawfully keep said house where spiritous, vinous and malt liquors were sold as aforesaid to be drank, and which were drank, in said house and upon the appurtenances thereto belonging, in manner as aforesaid, in a disorderly manner, by then and there, during said times, unlawfully suffering and permitting divers persons on week days, and by day and night, to congregate in and about said house, and then and there make a great noise and disturbance by yelling, quarrelling, boisterous talking, fighting, swearing and drunken rows, and did then and there, during said times, and thereby maintain a common nuisance, to the disturbance, annoyance and common nuisance of divers good citizens of said county, who then and there resided, and did business within the immediate neighborhood of said house, and within sight, contrary," etc.

In the information, the residence of "the divers good citizens" is stated somewhat differently. It is therein stated that they lived and did business within sight and hearing of said house.

Upon the affidavit and information, appellant was found

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guilty, fined forty-four dollars, and his license forfeited. Very many alleged errors are discussed with much earnestness by his counsel, but, as we have reached the conclusion that the judgment must be reversed on account of an erroneous instruction, it will not be necessary for us to decide other questions. It will be observed that it is averred in the affidavit and information, that appellant was licensed to sell intoxicating liquors in the house alleged to have been kept in a disorderly manner. When it is sought to forfeit such license under the statute above set out, it is necessary to aver the existence of the license in the indictment, or affidavit and information. *Davis v. State*, 52 Ind. 488.

In one of the instructions, the trial court charged the jury that if they found the defendant guilty they should assess his fine at not less than \$10, nor more than \$100, and declare his license forfeited. Instruction number two given to the jury is as follows: "The information charges, among other things, that the defendant was licensed to sell spiritous, vinous and malt liquors, in a less quantity than a quart at a time, to be drank on the premises where sold. This is not a material allegation in the information, in the sense that the State is required to prove it, and the State, therefore, is not required to prove that allegation." This instruction, we think, is clearly erroneous, in view of the nature of the prosecution and the other instructions given.

The existence of such license is an affirmative fact necessarily averred, and necessary to be proven in some way, by some one, when a forfeiture is asked. There is no presumption to take the place of such proof, and surely it can not be expected that the jury shall render a verdict without evidence, or that the accused shall produce evidence to establish a material and affirmative averment in the indictment. We are not informed of the theory upon which the court below based this instruction; probably upon the cases of selling liquor without license, in which it has been held that the State need not prove the negative averment that the accused has no license.

Scott, Administrator, et al. v. Farman et al.

The grounds of these rulings are, that the averments are negative facts, peculiarly within the knowledge of the defendant, and difficult of proof by the State. *Shearer v. State*, 7 Blackf. 99; *Goodwin v. Smith*, 72 Ind. 113 (37 Am. R. 144). This can not be said of the case under discussion. Here the averment is affirmative, and of easy proof by the records of the county. The general rule is that whenever there is a plea of not guilty, as in this case, every substantial affirmative allegation in the indictment, material to the constitution of the offence, must be made good by the prosecution. 1 Whart. Crim. Law, section 592; 1 Bishop Crim. Proc., sections 1056 and 1057; *Commonwealth v. McKie*, 1 Gray, 61; *Lafayette, etc., R. R. Co. v. Ehman*, 30 Ind. 83.

Section 8 of the act of March 5th, 1859, as amended in 1865, Acts 1865, Spec. Sess., p. 197, made it unlawful for any person having a license to sell intoxicating liquors on Sunday. In a case under this statute, this court held that the State was bound to make good the averment of such license, and reversed the judgment for want of sufficient evidence. *Schlic v. State*, 31 Ind. 246.

It follows from what we have said that the trial court erred in overruling appellant's motion for a new trial.

The judgment is therefore reversed, with instructions to the court below to sustain the motion for a new trial.

Opinion filed at the November term, 1882.

Petition for a rehearing overruled at the May term, 1883.

No. 11,043.

SCOTT, ADMINISTRATOR, ET AL. v. FARMAN ET AL.

WILL.—Parties.—Complaint.—Supreme Court.—Where, in an action to set aside a will, the complaint shows no joint cause of action in the plaintiffs, it is insufficient and may be questioned by assignment of error in the Supreme Court on appeal.

From the Marion Circuit Court.

Ackerly et al. v. The Board of Commissioners of Knox County.

F. Rand, J. M. Winters, P. W. Bartholomew and R. A. Sprague, for appellants.

A. F. Denny, W. W. Herod and F. Winter, for appellees.

NIBLACK, C. J.—This was an action by Mary M. Farman, Emma L. Farman, Eliza E. Farman and Anna J. Farman, children and heirs at law of Francis L. Farman, deceased, against Adam Scott, administrator of the estate of the decedent, and others claiming an interest in the estate, to set aside the will of the said Francis L. Farman, which had been admitted to probate.

Verdict for the plaintiffs, and judgment setting aside the will.

The names of other persons were united and associated with the plaintiffs above named, but without any averment as to any interest on their part in the subject-matter of the action. It is now insisted that for that reason the complaint was insufficient. We think the objection is well taken, and that the judgment ought on that account to be reversed.
Harris v. Harris, 61 Ind. 117.

The judgment is reversed with costs, and the cause remanded for further proceedings.

Petition for a rehearing overruled.

No. 10,551.

ACKERLY ET AL. v. THE BOARD OF COMMISSIONERS OF KNOX COUNTY.

BILL OF EXCEPTIONS.—Time of Filing.—A bill of exceptions will not be regarded as part of the record unless filed within the time limited by the court.

SAME.—Evidence.—Where the evidence is necessary to enable the Supreme Court to properly consider and decide the questions argued, a bill of exceptions containing the evidence must be properly made a part of the record.

From the Knox Circuit Court.

The McCormick Harvesting Machine Company v. Hays.

W. F. Pidgeon, for appellants.

C. M. Wetzel, for appellee.

ELLIOTT, J.—It has been often decided that a bill of exceptions is not regarded as part of the record unless filed within the time limited by the court, and under this rule the paper purporting to be a bill of exceptions, and as such copied into the transcript in this case, can not be considered as part of the record, as it was not filed within the time prescribed. The motion for a new trial was overruled on the first day of April, 1882, and sixty days given in which to file a bill, but none was filed until the 6th day of June, 1882, which was not within the prescribed time.

Where the evidence is necessary to enable the court to properly consider and decide the questions argued, a bill of exceptions must be made part of the record, and as this has not been done, and as the evidence is necessary to a consideration of the questions sought to be presented, we must hold the appeal unavailing and affirm the judgment, and it is so ordered.

No. 10,740.

THE McCORMICK HARVESTING MACHINE COMPANY v.
HAYS.

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SALE.—Warranty.—Breach of.—A reaper was sold with a warranty that it would work well, the purchaser upon a day's trial to give the seller notice and allow time to put it in order, and if it could not be made to work return it. It failed to operate well; the notice was given, and, no one appearing to put it in order, the purchaser, after the lapse of a week, returned it, meantime continuing to use it until he had cut his grain. **Held**, that there was a breach of the warranty, and that the seller could not recover for the machine.

From the Hendricks Circuit Court.

L. M. Campbell, for appellant.

J. V. Hadley, E. G. Hogate and R. B. Blake, for appellee.

The McCormick Harvesting Machine Company v. Hays.

BLACK, C.—The appellant sued the appellee upon a written contract for the sale of a reaping machine, to recover the purchase-money therein promised. Issues were formed which were tried by the court. A special finding was rendered upon request. The appellant excepted to the conclusion of law, and filed a motion for a new trial, assigning as causes that the finding was contrary to law, and that it was not sustained by the evidence. The motion was overruled, and judgment was rendered for the appellee. The conclusion of law and the overruling of the motion for a new trial are assigned as errors.

The court stated the facts and its conclusions of law thereon as follows:

“ 1st. That on the 1st day of June, 1882, the plaintiff sold to the defendant a reaping machine for the price and sum of one hundred and forty dollars, and that on the same day the defendant executed to the plaintiff his written contract to pay the said sum of one hundred and forty dollars on September 1st, 1882, which contract is filed with the complaint herein, and is, in words and figures, as follows, to wit:

“ ‘ McCormick Harvesting Machine Company will ship for the undersigned, on or before June 10th, 1882, one of their latest improved imperial machines, including the usual extras, consigned to the care of Christie & Hicks at Danville, the undersigned agreeing on delivery of the machine to pay the McCormick Harvesting Machine Company one hundred and forty dollars cash, September 1st, 1882, with interest thereon from August 1st, 1881, until due, and at the rate of eight per cent. per annum from maturity until paid, the machine to be warranted as per following warranty, a copy of which I have this day received: This machine is warranted to be well made, of good material, and durable with proper care. If upon one day’s trial the machine should not work well the purchaser shall give immediate notice to said McCormick Harvesting Machine Company or their agent, and allow time to send a person to put it in order. If it can not then be made to work well, the purchaser shall return it at

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once to the agent of whom he received it, and all cash and notes received in settlement will be refunded.

(Signed) 'HENRY H. HAYS.

"Dated the 1st day of June, 1882.'

"2d. That the plaintiff delivered to the defendant, at the time of the said sale of said machine, a written warranty, providing, among other things, that if said machine did not work well upon one day's trial, then the defendant should give immediate notice thereof to the plaintiff or his agents, and to allow the plaintiff time to send a person to put said machine in order, and that if it then could not be made to work well, then the defendant should at once return the same to plaintiff, and that the plaintiff should return to defendant the notes and money he may have given for the same.

"3d. That on the evening of the 29th day of June, 1882, defendant began to use said machine in cutting wheat, when he cut a few rounds; that he used the same all the next day; that said machine did not work well, in this, to wit, that it could not be turned properly; 2d, that it did not rake the wheat off properly; 3d, that the side draft of said machine was too heavy.

"4th. That on the next morning, July 1st, before sunup, the defendant mailed a letter from New Winchester, directed to Christie & Hicks, plaintiff's agents at Danville, Indiana, notifying them that said machine did not work well; that he knew that the mail would not leave New Winchester until about twelve o'clock that day, and that it would not reach Danville until about two o'clock in the afternoon; that he then discharged a part of his hands, and continued to cut wheat slowly during the day, while waiting for the plaintiff's agent, and that he finished cutting his wheat in the evening of that day, having cut fifteen acres in all, and that he did not use said machine any more.

"5th. That the said letter of the defendant was received at Danville by said Hicks in the evening, about dark, of the day

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it was posted by defendant, and that on the evening of the same day, about an hour before sundown, and after defendant had finished cutting his wheat, the said Christie was riding by defendant's house, when defendant called to him and notified him that said machine did not work well; and that said Christie did not offer to return next week and put said machine in order and make it work; that there was wheat in defendant's neighborhood still uncut during the week following, in which the said machine might have been further tested.

" 6th. That the plaintiff nor her agents did not send a person to put said machine in order or make it work well, and that on Saturday, July 8th, 1882, the defendant returned said machine to Christie & Hicks, plaintiff's agents at Danville, and left it near their place of business, and has not since exercised any control over the same, but that the plaintiff, through her agents, refused to accept the same, and has not since assumed any control or ownership of the same.

" From the above facts the court draws the following conclusions, to wit:

" 1st. That it was incumbent on the plaintiff to send a person to put said machine in order during the week after the reception of the notice that it did not work well; and that the plaintiff not doing this, the defendant had a right to return the machine on Saturday, July 8th, 1882, to the plaintiff's agents; and that having done so the defendant is not liable on the note or contract to pay for said machine."

It is contended for the appellant that upon a fair construction of the contract, the facts stated by the court do not show that the appellee gave the appellant reasonable time and reasonable opportunity to put the machine in working order; that the appellee having finished the cutting of his own wheat before the appellant received the notice, the appellant had no reasonable opportunity within the time granted to remedy the defects.

The contract did not require that the purchaser should cease

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to use the machine after one day's trial if it did not work well, but it required that he should then notify the appellant or her agent; and it did not require that for the trial of the machine the purchaser should use it in his own grain or grass, or upon his own land, or that he should have or preserve any grain or grass of his own in which the person to be sent by appellant might test the machine, but it required that he should allow time to send a person to put the machine in order.

We can not say, under the circumstances shown by the finding, that the appellee was not acting within the contract, in proceeding on Saturday, in the manner stated, to cut the remainder of his wheat while awaiting the coming of the agent of the appellant, or that he thereby waived the warranty.

Without the showing of an express agreement to wait longer than a week, or circumstances from which such an agreement might be implied, or that the appellant was in any way prevented or excused by the appellee from trying to make the machine work well, the facts stated would authorize a conclusion that the appellant was allowed the time and opportunity required by the contract.

There was evidence tending to prove all the facts found by the court. There was some evidence introduced in behalf of the appellant tending, in support of her reply, to show that the appellant's agents offered to put the machine in order, after the receipt of the notice and before the return of the machine, and that they were not permitted to do so by the appellee; but this was contradicted by evidence on the part of the appellee. We can not interfere with the result reached in the trial court upon conflicting testimony.

The judgment should be affirmed.

PER CURIAM.—It is ordered, upon the foregoing opinion, that the judgment be affirmed, at appellant's costs.

Fawkner v. Baden et al.

No. 10,358.

FAWKNER v. BADEN ET AL.

REPLEVIN.—*Justice of the Peace.*—*Jurisdiction.*—*Statute Construed.*—The jurisdiction of a justice of the peace, in an action of replevin, is governed by the provisions of section 1433, R. S. 1881, and not by the provisions of section 1547, R. S. 1881.

SAME.—*Bond or Undertaking.*—*Dismissal of Action.*—*Error.*—Where the plaintiff in replevin, before a justice of the peace, files with the justice an undertaking, as provided in section 1270, R. S. 1881, instead of the penal bond required in section 1547, *supra*, such undertaking is in substantial compliance with the requirements of the latter section, and is a valid, legal and binding obligation; and in such case it is error to sustain a motion for the dismissal of the action for the want of a penal bond.

SAME.—*Affidavit.*—*Writ of Replevin.*—*Motion to Quash.*—In such a case, where the justice has issued a writ of replevin, the proper remedy of the defendant, if he claims either that the affidavit is defective or that the bond is insufficient, is a motion to quash the writ for either or both of such causes.

From the Superior Court of Marion county.

J. W. Harper, for appellant.

R. Hill, J. W. Nichol and W. H. Martz, for appellees.

Howk, J.—This suit was commenced by the appellant against the appellees before a justice of the peace of Center township, Marion county. The object of the suit was to recover the possession of certain personal property, of which the appellant stated that she was the owner and entitled to the possession, and that the same had been wrongfully taken, and was unlawfully detained, from her by the appellees, in Marion county. With her verified complaint, the appellant filed an undertaking, which was approved by the justice, and thereupon he issued an order to the proper constable for the delivery of the property to the appellant, by whom it was returned duly served. On the appellees' application, the venue of the action was changed to another justice, before whom the appellant asked leave to file the bond required by the statute, in lieu of the undertaking theretofore filed by her at the commencement of this suit. The appellees moved the

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justice to dismiss the suit for the want of a sufficient bond, and for the want of a sufficient complaint. With leave of the justice, the complaint was amended and re-sworn to by the appellant, but the justice sustained the appellees' motion and dismissed the action for the want of a sufficient bond, and rendered judgment accordingly.

On appeal, the appellees moved the court at special term, in writing, to dismiss this action, for the reason that there was no sufficient bond filed by the appellant to give the justice of the peace jurisdiction of the suit. This motion was sustained by the court at special term, and to this ruling appellant excepted and filed her bill of exceptions; and judgment was rendered against her for appellees' costs. On appeal to the general term, the judgment at special term was in all things affirmed; and from the judgment of the general term this appeal is now here prosecuted.

From the foregoing summary of the proceedings below in this cause, it will be readily seen that the fundamental question for decision is this: Did the justice of the peace, before whom this suit was commenced, have jurisdiction to try and determine such suit? If the justice had such jurisdiction, the judgment below must be reversed; but if he had no jurisdiction to try and determine the appellant's suit, the judgment must be affirmed.

In section 1547, R. S. 1881, in force since August 6th, 1859, it is provided in effect, that whenever any plaintiff shall, by complaint in writing, verified by affidavit, before a justice of the peace, set forth that his personal goods, not exceeding in value one hundred dollars, have been wrongfully taken, or are unlawfully detained, by any other person, specifically describing such property and giving the value thereof, etc., "and shall file with such justice a bond, with surety to be approved by such justice, and payable to the defendant in a sum double the value of such goods, conditioned," etc., "the justice shall issue to some constable of the county his writ, commanding him to take the property described, and

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deliver it forthwith to such plaintiff, and that he summon said defendant to appear at a time and place therein named, before such justice, to answer such complaint."

In section 1433, R. S. 1881, in force since July 5th, 1861, and therefore a later expression of the legislative will than section 1547, it is provided as follows: "Justices of the peace shall have jurisdiction to try and determine suits founded on contract or tort, where the debt or damage claimed or the value of the property sought to be recovered does not exceed one hundred dollars; and concurrent jurisdiction to the amount of two hundred dollars; but the defendant may confess judgment for any sum not exceeding three hundred dollars. No justice shall have jurisdiction in any action of slander, for malicious prosecutions, or breach of marriage contract, nor in any action wherein the title to lands shall come in question, or the justice be related by blood or marriage to either party."

In *Harrell v. Hammond*, 25 Ind. 104, it was held by this court, and correctly so we think, that justices of the peace, under section 1433, R. S. 1881, have jurisdiction in actions of replevin, where the value of the property sought to be recovered, or the damages claimed, do not exceed two hundred dollars. So, this court held, also, in *Deam v. Dawson*, 62 Ind. 22. In the case in hand, the value of the property sought to be recovered was alleged to be in the aggregate \$178.50, and the damages claimed by the appellant for the detention of the property were \$10. As these two sums, in the aggregate, do not exceed \$200, we are of opinion that the justice of the peace, before whom this suit was commenced, had jurisdiction to try and determine the same, whether the bond filed by the plaintiff was or was not sufficient, and even though she had not filed any bond. In other words, we think that jurisdiction to try and determine this action was conferred upon the justice of the peace by the provisions of section 1433, R. S. 1881.

The appellant's verified complaint in this case, as amended

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before the justice, was in strict conformity with the requirements of section 1547, R. S. 1881; but the bond filed with such complaint, although taken and approved by the justice, was not in terms a penal bond "in a sum double the value" of the goods sought to be recovered. The suit was commenced before the justice on the 29th day of August, 1881, while the civil code of 1852 was yet in force, and the appellant filed with her verified complaint the written undertaking required of the plaintiff in section 132 of that code (section 1270, R. S. 1881), in an action of replevin commenced in the circuit court, instead of the penal bond required by section 1547, R. S. 1881, where the action is commenced before a justice of the peace. The undertaking filed by the appellant was that she should "prosecute this action with effect and without delay, and return the property in controversy to the defendants, if a return thereof be adjudged by the court, and pay to them all such sums of money as they may recover against the plaintiff in this behalf, for any cause." If the appellant had filed the penal bond, required by section 1547, the contract therein would have been that she should prosecute her complaint to effect and return the goods to the defendants, if judgment of return be awarded them, and pay all damages awarded them. The undertaking given was without any specified limit; while the bond required would have been limited to a sum double the value of the goods sought to be recovered. With this exception, which is favorable to the appellees, it will be seen that the difference between the undertaking given and the penal bond required is one of form and not of substance. We are of the opinion, therefore, that the undertaking filed by the appellant before the justice, in this case, was in substantial compliance with the requirements of section 1547, R. S. 1881, and, though perhaps informal, was a valid, legal and binding obligation. *Bugle v. Myers*, 59 Ind. 73; *Trueblood v. Knox*, 73 Ind. 310; *Carver v. Carver*, 77 Ind. 498.

We are aware that, in *Deardorff v. Ulmer*, 34 Ind. 353, this

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court seems to have reached a conclusion upon the question we are now considering, differing somewhat from the one here announced. In the case cited Ulmer commenced an action of replevin against Deardorff, before a justice of the peace, to recover the possession of certain personal property of the alleged value of \$70, and with his complaint he filed a bond in the penalty of only one hundred dollars, instead of in "a sum double the value of the goods" sought to be recovered, conditioned according to law. Before the justice, and, on appeal, before the court of common pleas, Ulmer recovered a judgment as demanded in his complaint, from which judgment Deardorff appealed to this court, and assigned as error the overruling of his motion to dismiss the action on the ground that the bond filed was not in a penal sum double the value of the property sought to be recovered, and his motion in arrest of judgment on the same ground.

It was held by this court that these errors were well assigned. After quoting the provisions of section 1547, R. S. 1881, the court said: "It seems quite clear to us, that the filing of the complaint in writing, and verified by affidavit, and the bond as required in the above section are necessary to confer jurisdiction upon the justice." In the opinion of the court there is no reference whatever to the later provisions of section 1433, R. S. 1881; and this latter section, as it seems to us, prescribes, regulates and governs the jurisdiction of a justice of the peace in all civil actions, whether "founded on contracts or tort." Under this section we are of opinion that neither an affidavit nor a bond was necessary to the jurisdiction of a justice "to try and determine" an action of replevin. In so far as the affidavit is concerned, it was so held by this court at the same term *Deardorff v. Ulmer, supra*, was decided, in the case of *Eddy v. Beal*, 34 Ind. 159.

In the latter case, which was an action of replevin commenced before a justice and appealed to a common pleas court, the court had found that the plaintiff's affidavit was insufficient, and, on this finding, had rendered judgment for the de-

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fendant. On appeal this court reversed the judgment, and, in delivering the opinion of the court, WORDEN, J., said: "This judgment can not be sustained. We have seen that a good complaint was filed before the justice, claiming the property, and demanding damages in the sum of fifty dollars. The affidavit will, it is true, in such cases, answer for a complaint, but there is nothing in the law to prevent the filing of the complaint separate from the affidavit."

If the justice of the peace has jurisdiction to try and determine the plaintiff's complaint in an action of replevin, the suit can not lawfully be dismissed, we think, on account of any defect either in the affidavit or in the bond. In such case, where a writ of replevin has been issued, the proper remedy of the defendant is a motion to quash the writ for the want of either a sufficient affidavit or a sufficient bond. In *Bugle v. Myers, supra*, after quoting at length section 790 of the civil code of 1852 (sec. 1221, R. S. 1881), in relation to a defective bond, recognizance or written undertaking, taken by any officer in the discharge of the duties of his office, the court said: "The operation of this section was to make the undertaking filed in this case a good and sufficient bond. And the object of it was to save these legal instruments from invalidity on account of the defects mentioned. The bond, in this case, did not subject the action to a motion to dismiss."

In the case at bar we are clearly of the opinion that the appellees' motion to dismiss the appellant's action was not well taken, and ought to have been overruled.

The judgment is reversed, with costs, and the cause is remanded, with instructions to overrule the motion to dismiss the action, and for further proceedings not inconsistent with this opinion.

Nowling v. McIntosh.

No. 10,777.

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NOWLING v. McINTOSH.

EXECUTION.—*Exemption.—Judgment.—Tort.*—A widow, by concealing an antenuptial contract whereby she had relinquished all interest in her husband's estate, obtained from his administrator personal property of the value of \$600 as of right as widow. For this wrong the administrator afterwards sued her and obtained judgment.

Held, that the judgment was for a tort, and not upon contract, and no property was, under section 703, R. S. 1881, exempt from execution issued upon it.

From the Washington Circuit Court.

H. Heffren, J. A. Zaring and A. B. Collins, for appellant.

D. M. Alspaugh and J. C. Lawler, for appellee.

BICKNELL, C. C.—The appellant brought this suit against the appellee as sheriff.

The complaint averred that Jones, as administrator *de bonis non* of David Nowling, brought an action against the appellant, who was the decedent's widow, alleging that the said David and Rachel, before their marriage, and in consideration of their intended marriage, mutually agreed in writing that upon the death of either the survivor would make no claim to any of such decedent's property, but that all of it, real and personal, should go to the children of such decedent, free from any claim of such survivor; that David Nowling died testate on March 2d, 1880; that said widow, on demand of her late husband's executor, delivered to him the personal property of the testator, without informing him of the existence of said antenuptial agreement, although she well knew its provisions, and then had it in her possession; that she concealed and withheld it from said executor, who, without any knowledge of it, allowed said widow to select from the inventory personal property of the appraised value of \$571.95, for which she received as widow; that said executor afterwards resigned his trust, and said Jones was appointed administrator

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de bonis non, and as such paid said widow \$28.05 in money, to make up the \$600, to which she claimed an exclusive right as widow; that when he paid this money he had no knowledge or notice of said agreement; that afterwards he discovered its existence and demanded from the widow the property and money "so received by her in violation of said antenuptial agreement;" that she refused to give up the property and money, but delivered to him the written agreement; that said property and money are of the value of \$600; that the complaint in said action contained a list of the property so taken by the widow, and demanded judgment for \$700 damages and all proper relief.

The complaint in the present suit further averred that judgment was rendered in said action against the widow, the present appellant, for \$500 and costs; that an execution, issued on said judgment, came into the hands of the appellee as sheriff; that the appellant made a proper affidavit and a schedule of all her property, real and personal, claiming exemption under the statute as a resident householder, and delivered the same to the appellee, demanding that said property be appraised and that the amount allowed her by law be set apart as exempt from execution, and nominating an appraiser on her part; that the appellee refused and still refuses to have said property so appraised and set apart, and threatens to levy said execution on said property. The appellant's complaint prayed for a writ of mandate, requiring the appellee to have said property appraised and the proper amount thereof set apart as exempt from said execution, and for all proper relief.

The appellee demurred to this complaint, for want of facts sufficient; the court sustained the demurrer; judgment thereon was rendered in favor of the appellee, and the widow appealed.

The only error assigned is sustaining the demurrer to the complaint.

The only question presented by the record is, was the judgment, obtained by Jones against the appellant, a "debt grow-

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ing out of or founded upon a contract, express or implied?" If so, the appellant was entitled to exemption, otherwise not. R. S. 1881, section 703; *State v. Melogue*, 9 Ind. 196.

The suit of Jones against the appellant was not for a violation of the antenuptial contract; the complaint therein exhibited neither the original contract nor a copy of it. The cause of action stated therein was the wrongful act of the appellant in claiming and receiving, upon a false pretence and upon a suppression of the truth, property to which she had no claim as widow. This was a tort.

The appellant claims that in certain cases a party may waive the tort and sue upon the contract implied by law from the facts stated; that this was done in the action against the appellant by Jones.

There are such cases, but the waiver must appear upon the pleadings and issues. *Patterson v. Crawford*, 12 Ind. 241; *Patterson v. Prior*, 18 Ind. 440; *Jones v. Gregg*, 17 Ind. 84; *Cooper v. Helsabeck*, 5 Blackf. 14; *Morford v. White*, 53 Ind. 547.

No such waiver appears here; the complaint of Jones against the appellant claimed damages for the appellant's wrongful act; a judgment upon such a complaint is not for a debt growing out of, or founded upon, an implied contract. *Menzie v. Anderson*, 65 Ind. 239; *Dorrell v. Hannah*, 80 Ind. 497; *Smith v. Wood*, 83 Ind. 522; *Gentry v. Purcell*, 84 Ind. 83. There was no error in sustaining the demurrer to the complaint in this suit. It was insufficient because exemption exists only in actions upon contract, and because it claimed exemption on a judgment obtained in an action sounding in tort. *Boesker v. Pickett*, 81 Ind. 554; *Keller v. McMahan*, 77 Ind. 62.

The judgment ought to be affirmed.

PER CURIAM.—It is therefore ordered, on the foregoing opinion, that the judgment of the court below be and it is hereby in all things affirmed, at the costs of the appellant.

The Indiana, Bloomington and Western Railway Company *v.* Leak.

No. 10,091.

THE INDIANA, BLOOMINGTON AND WESTERN RAILWAY
COMPANY *v.* LEAK.

RAILROAD.—Action Against for Stock Killed.—Fencing.—Where an animal is killed by cars, having entered upon the railroad at a place not fenced on either side, but where it is practicable to fence only on one side, the railroad company is not liable under the statute. R. S. 1881, sections 4025—4032.

From the Hendricks Circuit Court.

C. W. Fairbanks, J. V. Hadley, E. G. Hogate and R. B. Blake, for appellant.

T. S. Adams, for appellee.

FRANKLIN, C.—The only question presented and discussed by counsel in this case is whether the court erred in its conclusions of law upon the facts stated. Appellee sued appellant for the value of a horse killed by the running of the cars on appellant's road. The complaint was originally in two paragraphs, the first charging that the road at the point where the horse went upon the track was not securely fenced in, and the second charging negligence in the running of the cars. The second paragraph was subsequently withdrawn, and the cause was submitted to the court on the first paragraph. The court's conclusions of law and judgment were in favor of the appellee for the value of the horse.

The special findings upon which the court stated its conclusions of law are as follows:

“1st. The court finds that the plaintiff's horse was struck and killed by the locomotive of the defendant, while being run upon the railroad of the defendant, at the town of Lizton, in Hendricks county, Indiana, on the 20th day of September, 1881, and that the horse was of the value of \$125.

“2d. Said town contains about 300 inhabitants, and at that time the defendant in the northern part of said town maintained, about six feet north of her main track, a switch or

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side track about 1200 feet long; at a point about 100 feet west of the east end of the switch was a public highway, crossing the railroad; and at a point about 400 feet west of this highway a public street, running north through said town, crossed the railroad; both sides of the railroad between these two highways were occupied with residences, stores, warehouses and other buildings. At a point on the south side of the railroad, and about 20 feet east of the street crossing, was the defendant's station for receiving and discharging freights and passengers; immediately west of the street crossing, and south and adjoining the railroad, was an unenclosed, unoccupied strip of ground about 300 feet long and 125 feet wide, designated on subjoined plat by letter 'A.' West of this strip of ground, to a point 100 feet west of the west end of the switch, the defendant's right of way was unenclosed, except by a farmer's fence along the south line thereof. On the west side of said public street, south of the railroad, is one tier of lots laid off and occupied with buildings, and west of the tier of lots, and south of the railroad, the land is enclosed farm lands. On the north side of the railroad, and west of the street crossing about 200 feet, the defendant maintains stock-pens, designated on subjoined plat by letter 'B.' About 100 feet west of the stock-pens, and from 150 to 180 feet north of railroad, was a flouring mill in operation, and about 300 feet west of flouring mill was a saw-mill in operation, designated on said subjoined plat by letter 'C.' The space between the mills and railroad was used as a lumber yard, and by the public in loading wood, lumber and staves on defendant's cars for transportation.

"3d. The plaintiff's horse went upon the railroad from the south, at the northwest corner of the strip of ground marked on plat by letter 'A,' and about 300 feet west of the street crossing, and a little west of the middle of the side track, and was killed at a point 240 feet west of the point of going on, or at a point designated in plat by letter 'D.'

"4th. On the west line of the street crossing the defendant

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could maintain cattle-guards, and on the south side of the railroad, west of the street crossing, could maintain a fence, without damage or inconvenience to itself or the public; but on the north side of the railroad could not erect or maintain a fence at any point in the space occupied by its switch and side track without damage and inconvenience to itself and the public.

"5th. The defendant maintained fences and cattle-guards at the east end, and 100 feet west of the west end of its switch and side track.

"6th. The subjoined and annexed plat, marked 'E,' is a correct plat of the premises.

"Upon the foregoing facts the court concludes the law to be: 1st. That the defendant ought to have maintained a fence at the point where the plaintiff's animal entered upon the railroad. 2d. That the defendant is liable for the value of the animal killed, to wit, one hundred and twenty-five dollars."

The question presented by the exceptions to the conclusions of law is, can a railroad company be held liable for the killing of stock that entered upon the track where one side of the road can be fenced and the other side must necessarily be left exposed, without any protection whatever, by fence or otherwise, against stock entering upon the track, for the reason that the road was not securely fenced in at that point?

This action is based upon the statute of March 4th, 1863, 1 R. S. 1876, p. 751, making railroad companies liable for the injuring or killing of stock by the running of their cars.

While the statute does not require the company to fence its road, the 7th section provides that "This act shall not apply to any railroad securely fenced in, and such fence properly maintained by such company, lessee, assignee, receiver, or other person running the same."

The statute makes no exception of places where the road can not be securely fenced in; but the courts have held that such places form proper exceptions, and the statute does not

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apply to them. See the cases of *Indianapolis, etc., R. R. Co. v. Kinney*, 8 Ind. 402; *Lafayette, etc., R. R. Co. v. Shriner*, 6 Ind. 141; *Bellefontaine R. W. Co. v. Suman*, 29 Ind. 40; *Indianapolis, etc., R. W. Co. v. Caudle*, 60 Ind. 112; *Indianapolis, etc., R. R. Co. v. Christy*, 43 Ind. 143; *Indianapolis, etc., R. R. Co. v. Oestel*, 20 Ind. 231; *Indianapolis, etc., R. R. Co. v. Parker*, 29 Ind. 471; *Indianapolis, etc., R. R. Co. v. Lowe*, 29 Ind. 545.

Where one side can not be fenced in, but must necessarily be left open and free for access to the railroad track, there the railroad can not be securely fenced in by building a fence on the other side.

In this case, to place a fence on the south side of the right of way, and a cattle-guard on the west side of the street, connected with the east end of the fence, where the plaintiff insists they ought to be, would be worse than no security; they would only furnish a trap in which trains going east would catch stock when therein frightened while attempting to escape by crossing the track in front of the engine. Such a fence could afford no security. While it might prevent stock from entering upon the track from that side, it would be more dangerous for stock entering upon the track from the other side and crossing over; it would prevent their escape without recrossing the track.

We do not think the railroad, at the point where the appellee's horse entered upon the track, could, consistently with appellant's business and the interest of the public, be securely fenced in; and that appellant is not liable for killing appellee's horse, merely because it had not erected a fence on the south side of the road at the point where the horse entered upon the track.

The facts found by the court do not sustain the conclusions of law. The court erred in overruling the exceptions, for which error the judgment must be reversed.

PER CURIAM.—It is therefore ordered, upon the foregoing

The State *v.* Lauderma.

opinion, that the judgment of the court below be and it is in all things reversed, at appellee's costs, and that the cause be remanded, with instructions to the court below to sustain appellant's exceptions to the conclusions of law, to enter conclusions of law in accordance with this opinion, and render judgment thereon in favor of defendant.

No. 11,048.

THE STATE *v.* LAUDERMAN.

From the Huntington Circuit Court.

F. T. Hord, Attorney General, C. W. Watkins, Prosecuting Attorney, and B. M. Cobb, for the State.

NIBLACK, C. J.—This was a prosecution against George Lauderma, under section 2098 of the Revised Statutes of 1881, upon affidavit and information, for selling intoxicating liquor to be drunk as a beverage after eleven o'clock at night.

Lauderma pleaded in abatement that the prosecution was not commenced by first filing with the clerk of the Huntington Circuit Court the affidavit of some competent and reputable person charging the offence, with, also, the names of the witnesses; that the only affidavit on file in the cause was one written upon the same sheet with, and attached to, the information; that said affidavit was made and deposited with the prosecuting attorney, who did not file the same until he had prepared an information in the cause, when both it and the information were filed at the same time. Wherefore it was averred that this prosecution was not commenced in the manner prescribed by law.

The State demurred to this plea in abatement, and the court overruled the demurrer. The State declining to plead further, final judgment was rendered in favor of Lauderma, and he was discharged.

Error is assigned only upon the overruling of the demurrer to the plea in abatement.

In the case of *State v. De Long*, 88 Ind. 312, a plea in abatement precisely similar to the one filed in this case was considered, commented upon and held to be insufficient, upon the ground that an affidavit, in cases like this, is filed in time when it is filed with the information.

Upon the authority of that case the judgment appealed from in this case will have to be reversed.

The judgment is reversed, with costs, and the cause remanded for further proceedings.

The Indianapolis Cabinet Company v. Tucker.

No. 9430.

DEITCH v. DEMOTT ET AL.

From the Marion Superior Court.

F. M. Finch and J. A. Finch, for appellant.*B. F. Davis*, for appellees.

WORDEN, J.—This was an action by the appellant against the appellees. Trial by the court, finding and judgment for the defendants. The plaintiff appealed from special to general term, where the judgment rendered at special term was affirmed.

The errors assigned here are the same as were assigned on appeal from special to general term; there is no error assigned on the decision of the court below at general term in affirming the judgment rendered at special term, as there should have been in order to raise any question here. The authorities upon this point are abundant. We cite a few of them: *Van Dusen v. Kindleburger*, 44 Ind. 282; *Munson v. Lock*, 48 Ind. 116; *Beineke v. Wurgler*, 77 Ind. 468; *Leary v. Smith*, 81 Ind. 90.

The judgment below is affirmed, with costs.

Opinion filed at the November term, 1882.

Petition for a rehearing overruled at the May term, 1883.

No. 10,747.

THE INDIANAPOLIS CABINET COMPANY v. TUCKER.

From the Marion Superior Court.

R. S. Turrell, W. F. Stilz, A. C. Harris and W. H. Calkins, for appellant.*M. G. McLain and J. P. Baker*, for appellee.

BICKNELL, C. C.—This was a suit by the appellant against the appellee upon a promissory note which had been indorsed in blank by the appellee for the accommodation of the maker. The note was payable at Fletcher's bank, in Indianapolis, and had been discounted by said bank, who held it at maturity.

The complaint averred that the note was for value delivered to the bank, by whom it was for value delivered to the plaintiff.

The defendant filed an answer and a cross complaint. The answer was in two paragraphs, to wit:

1. A general plea of payment before suit brought.
2. A special plea of payment.

The cross complaint alleged substantially the same facts stated in the second paragraph of the answer, and prayed for the cancellation of the note and for all other proper relief. The plaintiff replied in denial of the answer, and answered in denial of the cross complaint.

Upon a trial by the court in special term, there was a finding for defendant, and the note was ordered to be cancelled as to the defendant.

The Jeffersonville, Madison and Ind'polis R. R. Co. et al v. Barbour et al

The plaintiff moved for a new trial, alleging that the finding was not sustained by sufficient evidence and was contrary to law. This motion was overruled, and judgment was rendered on the finding. The plaintiff appealed to the superior court in general term, assigning as error the overruling of the motion for a new trial. The court in general term affirmed the judgment of the court in special term. The plaintiff appealed to this court, assigning here for error that the court in general term erred in affirming the judgment of the court in special term. The only matter presented by the record is the sufficiency of the evidence. The question is: Was the note paid, or was it purchased from the bank by the plaintiff? The evidence is conflicting, but there is testimony tending to support the finding. The judgment, therefore, must be affirmed. *Shields v. Moore*, 84 Ind. 440; *Michael v. Dunkle*, 84 Ind. 544 (43 Am. R. 100).

PER CURIAM.—It is therefore ordered, on the foregoing opinion, that the judgment of the court below be, and the same is hereby, in all things affirmed, at the costs of the appellant.

No. 8635.

**THE STATE, EX REL. TRAVELLERS INSURANCE COMPANY, v.
PARKINSON ET AL.**

From the Newton Circuit Court.

A. Walcott, F. H. Levering, D. V. Burns and C. S. Denny, for appellants.

S. P. Thompson, T. Thompson, B. Harrison, C. C. Hines and W. H. H. Miller, for appellees.

ELLIOTT, J.—Affirmed on the authority of *State, ex rel., v. Harris*, ante p. 363.

No. 9660.

**THE JEFFERSONVILLE, MADISON AND INDIANAPOLIS RAIL-
ROAD COMPANY ET AL. v. BARBOUR ET AL.**

From the Bartholomew Circuit Court.

S. Stansifer and W. D. Stansifer, for appellants.

J. B. Reeves and N. R. Keyes, for appellees.

HAMMOND, J.—This action is between the same parties, and in all essential respects is the same, as *Jeffersonville, etc., R. R. Co. v. Barbour*, ante, p. 375, and upon the authority of the decision in that case the judgment of the court below is reversed, with instructions to sustain the appellants' demurrer to the complaint, and to overrule the appellees' demurrer to the appellants' counter-claim.

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AUDITOR OF STATE.

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2. *Mandate.—Justice of Claim.*—The justice of the relator's claim, which is apparent and unquestioned, does not authorize the courts to require by mandate the Auditor of State to issue his warrant, or the Treasurer of State to pay such warrant, for the amount of such claim, where no money is set apart for such purpose by an appropriation made by law. *Ib.*
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2. *Same.—Description of Stock.*—“Ten shares of the capital stock of said bank, then the property of” a person named, in a writ of mandate against a bank and its officers to compel them to permit a transfer of stock, is a sufficient description of the stock. *Ib.*

3. *Same.*—In such case, an alternative writ against the officers of a bank which, with the other necessary averments, shows that they are such officers, have charge of the transfer books, and refuse to allow access thereto by the sheriff for the purpose of transferring the stock, is good on demurrer. *Ib.*
4. *Same.*—*Return.*—*Pledge of Stock.*—*Surety.*—*Indemnity.*—A return to such writ by a national bank, that before the levy one H. held, and still holds, the certificates of stock in pledge to indemnify him as surety for the owner upon an unpaid indebtedness, is bad on demurrer; so, also, that the owner of the stock was, before the levy, and still is, indebted to the bank in a sum exceeding the value of the stock, and that in such case a by-law of the bank forbids a stockholder to transfer his stock. *Ib.*
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3. *Same.*—*New Trial.*—Affidavits in support of a motion for a new trial can not be made a part of the record on appeal by a recital in the motion therefor; they must be embodied in a bill of exceptions. *Ib.*
4. *Duty of Judge.*—The duty of the judge is to make a bill of exceptions speak the truth, and he may, therefore, amend it after it is signed but before it is filed. *Longworth v. Higham, 352*
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8. *Time of Filing.*—*Practice.*—Prior to the act of 1881, R. S. 1881, section 626, a ruling made during the trial could not be brought into the record for review in the Supreme Court by a bill of exceptions filed on time granted, at a subsequent term, at which a motion for a new trial was overruled. *Mullany v. First Nat'l Bank, 424*
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4. *Same.—Ecclesiastical Jurisdiction.*—When a person becomes a member of a church, he becomes so upon the condition of submission to its ecclesiastical jurisdiction, and, however much he may be dissatisfied with the exercise of that jurisdiction, he has no right to invoke the supervisory power of a civil court so long as none of his civil rights are involved.
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into two separate and conflicting bodies, and one of these bodies, to the exclusion of the other, is recognized by the proper Yearly Meeting as constituting the true Quarterly Meeting, the decision of the Yearly Meeting in that respect, when established as a fact, is binding upon the civil courts as regards questions of property arising out of the division between such separate and conflicting bodies. *Ib.*

9. *Same.*—*Eleemosynary Corporation.*—An eleemosynary charity is, in the general scope of its benevolence, essentially unsectarian, and can only be made sectarian by having such limitations and restrictions placed upon it by the donor as make it so. *Ib.*
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COLLATERAL ATTACK.

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2. *Same.*—*Delay Caused by Mob.*—*Insurrection and Riot.*—In such case, where the delay in transportation of stock is caused, not by the negligence or wrongful act of the carrier or its employees, but solely by the violence and riotous conduct of a lawless mob, which the carrier and the civil authorities of the State are alike unable to resist or control, the defendant is not liable for the damages resulting from such delay. *Ib.*

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CONTRACT.

See ATTORNEY AND CLIENT; COMMON CARRIER; DECEDENTS' ESTATES, 11; EXECUTION, 8; HUSBAND AND WIFE, 1, 4 to 6; INSURANCE; LANDLORD AND TENANT; LOTTERY; PARTNERSHIP, 3, 4; PLEADING, 10; SALE; TELEGRAPH COMPANY; VENDOR AND VENDEE; WILL, 1.

1. *Conveyance*.—*Condition Subsequent*.—*Consideration*.—*Agreement to Maintain Grantor and Wife*.—*Husband and Wife*.—*Divorce*.—*Lien*.—*Judgment*.—*Prayer of Complaint*.—*Performance*.—A husband and wife joined in a conveyance of lands of which the husband was seized in fee, to a son of the husband by a former marriage, which the son accepted. In the deed it was declared that the land was thereby encumbered with one-half of the expenses of maintaining the grantors and each of them during the life of each, in a manner comporting with their station in life and former mode of living, and that on failure by the grantee to furnish such maintenance the land should revert to the husband. Afterwards the grantors were divorced. The wife sued the son, averring these facts, and that one-half the cost of her support, provided for in the deed, since the execution thereof, was \$50 per annum; that the defendant failed to furnish such support, to her damage \$250, which is due and unpaid, for which she demands judgment, etc.

Held, that the grant was subject to a condition subsequent which the husband only could enforce, and also to a lien upon the land which either could enforce against the land, but not by personal judgment against the grantee.

Held, also, that the prayer for a personal judgment did not, under the statute (R. S. 1881, sec. 385), render the complaint bad on demurrer.

Held, also, that the divorce, though granted for the fault of the wife, did not terminate her right to the maintenance provided for in the deed.

Held, also, that the facts averred were sufficient on demurrer to justify a judgment enforcing the lien.

Held, also, that an answer to the whole complaint, averring performance of the condition by the defendant until the plaintiff abandoned her husband, who obtained a divorce for such abandonment, and that he had at all times been ready to support her at her husband's home, was bad on demurrer. *Copeland v. Copeland*, 29

2. *Award.—Fraud.—Set-Off.*—In a suit for work and labor in the building of a house, the defendant pleaded, as a set-off, that the work was done under a special contract to build the house for \$375; that after it was done a dispute arose as to the character of the work, which was referred to arbitrators, who had awarded the defendant \$25, and given notice of their award. Reply, that at an adjourned meeting of the arbitrators the defendant, the plaintiff being absent, by false statements as to the facts, procured the award.

Held, that the reply was bad on demurrer. *Norton v. Browne*, 333

3. *Abandonment.—Evidence.—Instruction.*—In a suit for work and labor in erecting a house, it was in question whether a special contract therefor had been abandoned. The jury was instructed that if, by direction of the defendant, the house erected was so different from that contracted for that all traces of the latter were so far lost that the one can not serve as evidence to identify the other, the fact *might be considered as a circumstance tending to prove that the special contract had been mutually abandoned.*

Held, that the instruction was erroneous. *Ib.*

4. *Statute of Frauds.*—Whenever so much of a contract as would otherwise be within the statute of frauds is executed, the remaining stipulations may be enforced. *Stephenson v. Arnold*, 426

5. *Voluntary Services.*—For voluntary services, without an express promise to pay, or circumstances from which the law implies a promise, there can be no recovery. *Warring v. Hill*, 497

6. *Specific Performance.*—As a general rule, one who seeks specific performance must have done all in his power to perform the contract on his part. *Vawter v. Bacon*, 565

7. *Same. — Enforcement of Execution.—Equity.*—The specific execution of a contract in equity is a matter, not of absolute right in the party, but of sound discretion in the court; so that a bill may be resisted on much weaker grounds than are necessary for its maintenance. *Ib.*

8. *Same. — Reformation of Contract.*—Upon the facts of this case—for which see opinion—

Held, that the court did not err in refusing to reform and specifically enforce the contract between the parties for the sale of realty. *Ib.*

9. *Same. — Contract to Execute Promissory Notes.—Special Terms.*—An agreement to execute promissory notes for certain sums does not bind the party to make notes with extraordinary provisions, such as for payment in bank, ten per cent. interest, and attorney's fees. *Ib.*

10. *Same.—Agreement to Convey Realty.—Consideration.—Deed.—Rescission.—Waiver.*—If A., who has agreed to convey realty to B. in consideration of the agreement of B. to execute to A. promissory notes for certain sums, payable at certain times, with interest, demands of B. notes drawing ten per cent. interest, payable in bank, and with attorney's fees, and insists on withholding a deed for the realty until such notes shall have been made, B. may treat the contract as rescinded, and does not waive this right by taking possession and making improvements, if A. thereafter continues to withhold the deed and to demand improper notes. *Ib.*

11. *Same.*—*Notice of Election to Rescind.*—*Escrow.*—*Agency.*—The agent of A. in such case, appointed to hold the deed and to deliver it only upon a compliance by B. with A.'s wrongful demands, was a proper person to receive notice of B.'s election to treat the agreement as rescinded. *Ib.*

CONTRIBUTION.

One of two joint debtors, who is compelled to pay the whole debt, may maintain a suit against the other for contribution. *Warring v. Hill*, 497

CONVERSION.

See CRIMINAL LAW, 9; GUARDIAN AND WARD, 3.

1. *Evidence.*—The exercise of dominion over the goods of another, and excluding him therefrom, in defiance of his rights, constitute in law a conversion, and not merely evidence of it. *Gordon v. Stockdale*, 240
2. *Jurisdiction.*—*Residence.*—*Principal and Agent.*—*Action, Where Commenced.*—Where two are sued for the conversion of goods who reside in different counties, the one having acted as the agent of the other in receiving and converting the goods, suit may be brought against both in the county where the agent resides. R. S. 1881, sec. 312.
Shearer v. Evans, 400
3. *Same.*—*Master and Servant.*—The mere fact that a hired servant has possession and control of his master's property gives him no power to sell it, or vest title in the purchaser. *Ib.*
4. *Same.*—*Stolen Goods.*—*Confusion of Goods.*—One who innocently buys stolen goods of a thief takes no title, and if he mix the goods with his own so that they can not be identified, and then sell them, he is liable for conversion. *Ib.*
5. *Same.*—*Agent.*—That one of the defendants was the agent of the other in doing the acts which constituted a conversion of goods, for which they are jointly sued, affords no protection to either. *Ib.*

CONVEYANCE.

See CONTRACT, 1, 10, 11; DECEDENTS' ESTATES, 9; DEMURRER TO EVIDENCE; DESCENTS, 1; FRAUDULENT CONVEYANCE; VENDOR AND VENDEE; WILL, 1.

1. *Condition Subsequent.*—*Construction.*—A condition subsequent is not favored, and is therefore very strictly construed.
Jeffersonville, etc., R. R. Co. v. Barbour, 375, 602
2. *Same.*—*Forfeiture.*—A conveyance of lands recited that it was made "expressly for the use and purpose of depot grounds for the M. & I. railroad," and that if there should be a failure to erect buildings and occupy it for that purpose, the land should revert to the grantors. After the erection of buildings and use of the land for the purpose specified for thirty-three years, it ceased to be so used, and a new location was made.
Held, that the condition was performed, and there was no forfeiture. *Ib.*
3. *Estoppel.*—A deed of real estate, with covenants of warranty, will, as a rule, estop the vendor from asserting an after-acquired title against his vendee or those claiming under him, but where such a deed simply purports to convey the right, title and interest of the vendor, it will not be such an estoppel. *Locke v. White*, 492
4. *Same.*—*Covenant of Warranty.*—*Vendor and Vendee.*—A general covenant of warranty, contained in a deed by which A., B. and W. convey two separate parcels of land in the northeast quarter of a certain section, is not limited to the interest that W. may have in the first described parcel by the following clause, inserted near the close of said deed, viz.: "And it is the express intention hereby to convey the entire interest of the said Micajah W. White in and to the said northeast quarter of

said section," and said W. is thereafter estopped, by the execution of such deed, from asserting an after-acquired title to such land as against his vendee, or those claiming through him. *Ib.*

5. *Same.—Action to Recover Real Estate.—Answer.*—In an action by W. and others to recover such parcel of land from the assignee of the vendee, an answer setting up such conveyance in bar of the action upon the part of W. was sufficient, and the court erred in sustaining a demurrer to it. *Ib.*

CORPORATIONS.

See BANK STOCK; CHURCHES; CITY; LOTTERY; TELEGRAPH COMPANY; TOWN.

1. *Franchise.—Forfeiture.—Collateral Attack.*—A cause of forfeiture of a franchise can not be taken advantage of collaterally, or otherwise than by a direct proceeding for that purpose, and this can be brought only by the government which granted the franchise. *State v. Woodward, 110 Sayers v. First Nat'l Bank, 230*
2. *Name.—Pleading.*—Where the name of the plaintiff imports a corporation, it is not necessary to aver in the complaint that the plaintiff is a corporation. *Sayers v. First Nat'l Bank, 230*
3. *Defective Organization.—Mortgage.*—A junior mortgagee can not defeat a senior mortgage by showing that the corporation to which the senior mortgage was executed was defectively organized, if it be a corporation *de facto*. *Williamson v. Kokomo, etc., Association, 589*
4. *Same.—Collateral Attack.*—Where the law authorizes a corporation, and there is an attempt in good faith to organize, and corporate functions are thereupon exercised, though some formalities required by law in the organization have been omitted, there is a corporation *de facto*, the legal existence of which can not ordinarily be questioned collaterally. *Ib.*
5. *Same.—Building Association.*—A building association filed its articles of association in the proper recorder's office, and a certified copy, instead of a duplicate as the statute requires, in the office of the Secretary of State, and then assumed the exercise of corporate functions, and took a mortgage.

Held, that a junior mortgagee could not question the corporate existence for the purpose of defeating the mortgage of the association. *Ib.*

COSTS.

See INSANITY, 2.

1. *Injunction.—Dismissal.*—A perpetual injunction, preventing the prosecution of a suit for non-payment of costs of a former suit for the same cause, which had been voluntarily dismissed by the plaintiff, is not proper. *Kills v. Willson, 95*
2. *Same.—Stay of Proceedings for Non-Payment.—Practice.*—A stay of proceedings because of non-payment of costs of a former suit for the same cause, which had been voluntarily dismissed by the plaintiff, is not a matter of right, but of sound discretion, to be exercised by the court in view of the facts of such case. *Ib.*
3. *Same.—Presumption.*—The order should be to stay proceedings, and may be to dismiss if the costs be not paid within a time fixed, but it should only be granted where the second suit is vexatious and without merit, and the latter will be deemed vexatious unless the plaintiff show the contrary. *Ib.*

COUNTER-CLAIM.

Process.—A defendant seeking relief against a co-defendant should file a counter-claim, and bring the co-defendant in by service of process unless he appears. *Warring v. Hill, 497*

COUNTY COMMISSIONERS.

See BRIDGES; HIGHWAYS, 1 to 4; RAILROADS, 9.

COUNTY SURVEYOR.

See SURVEY.

COUNTY TREASURER.

Official Bond.—Taxes.—A mortgagee can not maintain a suit upon a county treasurer's bond for failure to make taxes of the mortgagor out of his personal property.

State, ex rel., v. Harris, 363; State, ex rel., v. Parkinson, 602

COURTS.

See CHURCHES; INSANITY; STARE DECISIS; SUPREME COURT, 17.

COVENANTS OF WARRANTY.

See CONVEYANCE, 3 to 5; VENDOR AND VENDEE, 4, 8.

CRIMINAL CONVERSATION.

1. *Seduction.—Pleading.*—A complaint for criminal conversation need not allege the means by which the seduction of the wife was effected, nor that she is still the plaintiff's wife, nor that the defendant knew her to be such. *Wales v. Miner, 118*
2. *Same.—Divorce.*—That the plaintiff and his wife were divorced before the suit was begun is no defence to a suit for criminal conversation. *Ib.*
3. *Same.—Wife's Conduct.*—A wife is incapable of such consent to her own seduction as will bar the husband's right of action. *Ib.*
4. *Same.—Excessive Damages.*—One thousand dollars will not, by the Supreme Court, be deemed excessive damages in a suit for criminal conversation, though the wife may have been somewhat easily led astray, if the result is to induce a divorce. *Ib.*
5. *Same.—Evidence.—Statute of Limitations.*—In such case, evidence of guilt more than two years before bringing the suit, the statute of limitations being pleaded, may be given without first proving guilt within two years. *Ib.*
6. *Same.—Exemplary Damages.—Instruction.*—Exemplary damages may be allowed in all suits by a husband for the seduction of his wife, and though it is inaccurate to instruct the jury that this can only be done where the acts of the wrong-doer are *wilful*, the defendant can not be injured by it. *Ib.*

CRIMINAL LAW.

See INTOXICATING LIQUOR; LOTTERY.

1. *Cause for New Trial.—Improper Evidence.—Misconduct of Jury.*—Under section 1842, R. S. 1881, where it is shown that the jury has received and considered any evidence, paper or document, not authorized by the court, such misconduct of the jury will constitute a sufficient cause for a new trial. *Jones v. State, 82*
2. *Same.—Verdict.—Affidavits of Jurors.*—In such a case, the affidavits of the jurors are not competent for the impeachment of their verdict; but they are admissible for the purpose of showing that they had not, in fact, been guilty of the apparent misconduct charged against them, in order to sustain their verdict. *Ib.*
3. *Concealed Weapons.—Evidence.—Venue.*—Evidence, in a prosecution for carrying a concealed weapon, from which the jury may reasonably have inferred the venue as laid in the indictment and also the fact of the weapon being carried concealed, is sufficient, in respect to such proof, to sustain a verdict of conviction. *Burst v. State, 133*

4. *Same.—Traveller.—Statute Construed.*—In such a prosecution, the evidence showed that at the time of the alleged offence, and before and since, the defendant resided in P. county, was extensively engaged in the stave business, having stave yards in various places in that and an adjoining county, that he travelled from his residence in a buggy to and from these several places in attending to his said business, and was so engaged three-fourths of his time. On the day of the alleged offence, while travelling in his business, he stopped 22 miles distant from his home, at a picnic in P. county, and while there made a harmless exhibition of a pistol to one person, and then replaced it in his pocket. *Held*, that the defendant was a traveller within the meaning of the statute (R. S. 1881, sec. 1985), and the evidence insufficient to sustain a conviction. *Ib.*
5. *Continuance.—Witness.—Diligence.*—An affidavit by a defendant for a continuance on account of the absence of a material witness resident of another State, but so near that his deposition might have been taken, which shows no reason for omitting to take the deposition, save that the defendant was in jail, fails to show due diligence. *McDermott v. State*, 187
6. *Same.*—A continuance applied for on account of the absence of witnesses who appear personally in court should be refused. *Ib.*
7. *Same.—Murder.—Use of Weapon.—Intention.—Presumption.*—Where a homicide is caused by the intentional use of a deadly weapon in a manner likely to kill, a malicious intention to kill is a legal presumption, unless it occurred in self-defence, or on a sudden heat caused by such provocation as by law reduces the killing to manslaughter. *Ib.*
8. *Self-Defence.*—A homicide purposely committed is not excusable on the ground of self-defence, unless the accused reasonably believed it necessary to save his own life or avoid great bodily harm; but one may reasonably defend himself when assaulted, and if thereby the assailant be unintentionally killed, without a belief that the killing is necessary, the homicide is excusable. *Ib.*
9. *Embezzlement.—Larceny.—Master and Servant.—Conversion.*—Whatever would be embezzlement under the act of 1879 (Acts 1879, p. 126) would not be larceny, though it might have been larceny before the passage of that act, that act having the effect of so modifying by implication the older statute defining larceny. Hence a servant who, being without fraud entrusted with the possession of his master's goods, feloniously sells and thus converts them to his own use, is now guilty of embezzlement and not of larceny. *State v. Wingo*, 204
10. *Reasonable Doubt.—Jury.—Duty.—Instructions.*—Each juror should act for himself upon his individual convictions, and if, in a criminal case, he have a reasonable doubt of the defendant's guilt, he should not convict, but his doubts should not control the action of other jurors, and an instruction to that effect is proper. *Fassinow v. State*, 235
11. *Indictment.—Pleas in Abatement.*—Defects and irregularities not apparent on the face of the indictment must be pleaded in abatement. *Pointer v. State*, 255
12. *Same.—Pleas in Abatement and Bar.—Waiver.*—Pleas in abatement must be pleaded and disposed of before a plea in bar is interposed; by pleading in bar all matters of abatement are waived. *Ib.*
13. *Same.—Grand Jury.—New Trial.*—Irregularity in the proceedings before the grand jury which found the indictment is not cause for a new trial; so, also, the fact that the defendant had no opportunity to challenge grand jurors. The former might be pleaded in abatement, but the latter could not. *Ib.*
14. *Imperfect Transcript.—Dismissal of Appeal.—Certiorari.*—In criminal law,

as a general rule, the fact, though apparent, that the transcript is imperfect, affords no sufficient ground for the dismissal of the appeal; but in such case the remedy of the complaining party is, by writ of *certiorari*, to correct the transcript. *State v. Weil*, 286

15. *Same.*—*Duplicity in Criminal Pleading.*—*Motion to Quash.*—In criminal pleading, there can be no joinder of separate and distinct offences in one and the same count. Where the information or indictment charges the defendant in a single count with two or more substantive offences, it is bad for duplicity, and the defendant's motion to quash the same should be sustained. *Ib.*
16. *Public Highway.*—*Information for Obstructing.*—*Description.*—An information for obstructing "A certain public highway, situated on the half section line running north and south through the center of section 11, township 33, range 9, Lake county, Indiana," sufficiently describes the way, and shows it to be a public highway. *Nichols v. State*, 298
17. *Same.*—*Evidence.*—*Township Trustee.*—In a trial upon an information for obstructing a public highway, evidence that the township trustee told the defendant that he had a right to fence up the way is inadmissible. *Ib.*
18. *Same.*—*Intent.*—The intent with which a defendant, prosecuted criminally therefor, has obstructed a public highway, is not material. *Ib.*
19. *Same.*—*User.*—*Prescription.*—A way used by the public, and recognized by the proper officers, for more than twenty years, as a public highway, is, though it be short and terminate on private property, a public highway. *Ib.*
20. *Larceny.*—*Obtaining Money by Fraud.*—C., a passenger on a railway train, was seated with G., when S. entered, wearing a badge and falsely pretending to be an express agent, and informed G. that if he wished his baggage taken to Cincinnati he must pay charges thereon. G. offered a bank check, which S. said he could not cash, but would do so at Cincinnati if C. would cash it and hold it till they reached that city. C. handed over the money, when G. and S. rushed from the train, taking both money and check. G. had no goods on board by express, and the whole proceeding by G. and S. was a pre-arranged trick concocted by them to get possession of C.'s money, with intent to steal it. *Held*, that it was larceny by both. *Grunson v. State*, 533
21. *Information.*—*Practice.*—An affidavit, in a prosecution by affidavit and information, may be filed in the clerk's office at the same time as the information. *State v. Lauderman*, 600
22. *Sale of Lottery Tickets.*—*Vincennes University.*—The lottery privilege conferred upon the Vincennes University by the territorial legislature in 1807, was taken away by section 8, article 15, of the State constitution, and the statute (R. S. 1881, sec. 2077,) makes the sale of lottery tickets a crime. *State v. Woodward*, 110

CROSS-COMPLAINT.

See JUDGMENT, 1; MORTGAGE, 3; REAL ESTATE, ACTION TO RECOVER, 5.

CUL DE SAC!

See CRIMINAL LAW, 19.

DAMAGES.

See BRIDGES; CITY; COMMON CARRIER; CONSTABLE, 2; CRIMINAL CONVERSATION, 4, 6; HUSBAND AND WIFE, 5; PRACTICE, 12; RAILROADS, 7; REAL ESTATE, ACTION TO RECOVER, 1, 2; VENDOR AND VENDEE, 2, 4, 7, 8.

DECEDENTS' ESTATES.

See DESCENTS; EXECUTION, 8; PARTNERSHIP, 2; PROMISSORY NOTE, 4; WITNESS.

1. *Trial.—Jury.*—Any issue of fact concerning the settlement of the estate of a decedent was, prior to September 19th, 1881, triable by jury, at the request of either party, by the express provisions of section 188 of the act concerning decedents' estates, then in force.
Clouser v. Ruckman, 65
2. *Pleading.—Statute of Limitations.*—Under section 2324, R. S. 1881, the defence of the statute of limitations is available to an administrator or executor without being specially pleaded.
Zeller v. Griffith, 80
3. *Same. — Claim. — Evidence. — Harmless Error.*—In support of a claim against an estate for money paid on an execution against the decedent in his lifetime, the return on the execution, showing a payment more than six years before the filing of the claim, was offered in evidence and excluded.
Held, that, if error, it was harmless.
Ib.
4. *Sale of Lands.—Descent.—Estoppel.*—A court has no power, in selling the lands of an intestate, to make an order which will enable the purchaser to acquire more than the present estate of the heirs at law; nor can they be estopped by the order of sale from claiming an estate afterwards acquired.
Flenner v. Travellers Ins. Co., 164
5. *Trial of Claim.—Interrogatories to Jury.—Instructions.*—Under section 2325, R. S. 1881, the trial of a claim against a decedent's estate is to be conducted as the trial of an ordinary civil cause, and therefore it is proper for the court, on the trial of such a claim by a jury to instruct them at the request of either party, if they render a general verdict, to find specially upon particular questions of fact to be stated in writing. In such case an exception to such instruction will present no objection to either the form or substance of any interrogatory.
Boots v. Griffith, 246
6. *Administrator's Sale of Real Estate.—Master Commissioner.—Bond.—Consideration.—Common Law.*—An administrator, on proper petition in 1876, obtained an order to sell real estate of the decedent; a master commissioner was appointed to make the sale, and he gave bond, with securities, conditioned for the faithful discharge of his duties. He sold the land and converted a part of the proceeds to his own use.
Held, that the appointment of the commissioner was without authority of the statute and void, that the sale was void, and that the bond was void by statute, and, being without consideration, it was also void as a common law bond.
State, ex rel., v. Younts, 313
7. *Witness.—Discretion.*—The action of a trial court in requiring a witness, not otherwise competent, to testify as authorized by the act of 1879, Acts 1879, p. 245, was the exercise of an absolute discretion which could not be controlled by the Supreme Court.
Perrill v. Nichols, 444
8. *Same.—Statute of Limitations.—Pleading.*—The statute of limitations is available, without pleading it, as a defence to a demand against the estate of a decedent.
Ib.
9. *Same.—Estoppel. — Judgment. — Deed. — Consideration.*—A large claim against a decedent's estate (\$7,000), on which \$2,500 was allowed, was defended on the ground of estoppel by a judgment rendered in a suit by the administrator against the claimant to set aside a conveyance by the intestate of lands and a conveyance by this grantee to the claimant, with a view to make assets, for the reasons that the conveyances were without consideration, and that the grantor was, at the time, *non compos mentis*, which facts the grantee knew, and there had been a finding for the administrator that the causes alleged were true, and a decree accordingly. It appeared that upon that trial the facts involved in the present case had been substantially gone over.
Held, that the finding and judgment did not estop the claimant.
Ib.
10. *Claims.—Practice.—Statute Construed.*—Two days after a claim was filed

against an estate, it was brought to trial over the objection of the administrator.

Held, that, under the statute, Acts 1883, p. 155, section 7, this was error.

Scott v. Dailey, 477

11. *Same*.—*Liability for Attorney's Services*.—An attorney employed by residuary legatees, performing services beneficial to the estate, can not maintain a claim against the estate therefor. It is otherwise where the employment is by the administrator.

Ib.

DECLARATIONS.

See GUARDIAN AND WARD, 2; MARRIAGE, 2; PROMISSORY NOTE, 4.

DEDICATION.

See CRIMINAL LAW, 19.

DEED.

See CONTRACT, 1, 10, 11; CONVEYANCE; DEMURRER TO EVIDENCE; DESCENTS, 1; FRAUDULENT CONVEYANCE; VENDOR AND VENDEE; WILL, 1.

DEFAULT.

See REVIEW OF JUDGMENT.

1. *New Trial*.—That a party has been improperly defaulted is no cause for a new trial; and if the party defaulted afterwards plead without objection (the default having been vacated), he has no cause for any form of complaint.

Cupp v. Ayers, 60

2. *Setting Aside Judgment*.—*Amendment of Summons*.—Name.—Judgment by default was taken against a railway company, the summons and return naming it as a railroad company; at the same term the default and judgment were set aside and the plaintiff permitted to amend the summons and return by inserting the name of the defendant as a railway company and judgment then again taken on default.

Held, on appeal, that no error was committed in setting aside the default and judgment and permitting the amendment of the writ and service, the record showing that the proper representatives of the company had due notice of the action by such summons.

Chicago, etc., R. W. Co. v. Johnston, 88

DEMAND.

Sale.—*Ratification*.—Where A. without authority sells B.'s property, and the latter ratifies the sale, he can not maintain a suit for the money received without a previous demand therefor.

Babb v. Babb, 281

DEMURRER.

See DEMURRER TO EVIDENCE; DRAINAGE, 2; PLEADING, 4 to 9; SET-OFF.

DEMURRER TO EVIDENCE.

1. *Inferences*.—*Presumption*.—A demurrer to evidence admits every fact which the evidence tends to prove, and all reasonable inferences from them, but forced and violent inferences are not admitted.

Talkington v. Parish, 202

2. *Same*.—*Fraudulent Conveyance*.—*Husband and Wife*.—In an action against a husband and wife to set aside an alleged fraudulent conveyance, the evidence showed that the plaintiff had recovered a judgment against the husband for \$750, who did not then have, nor has he since had, any property subject to execution; that since the judgment the wife has purchased real estate worth \$5,000; that the estate of the wife's father amounted to \$733.33, of which her distributive share was \$104.76. The wife testified that she "had never inherited or received any property by gift or bequest, aside from her father's estate."

Held, that the evidence, upon a demurrer thereto, was insufficient to entitle the plaintiff to have the conveyance to the wife declared fraudulent. *Ib.*

DEPOSITIONS.

See CRIMINAL LAW, 5; NOTARY PUBLIC; PRACTICE, 1.

1. *Notice*.—*Judicial Knowledge*.—*Supreme Court*.—The Supreme Court takes judicial knowledge, that a notice at Ft. Wayne, served December 20th, to take depositions at Topeka, Kansas, on the 26th of the same month, gives sufficient time. *Fitzpatrick v. Papa*, 17
2. *Practice*.—Motions to quash depositions should be made before the commencement of the trial. *Newman v. Manning*, 422

DESCENTS.

See DECEDENTS' ESTATES, 4; WILL, 4, 5.

1. *Widow*.—*Second Wife*.—*Conveyance*.—*Life-Estate*.—*Statute Construed*.—*Trust*.—A widow without children, whose husband died leaving children of a previous marriage surviving, takes an estate in his lands in fee simple, which, under the proviso to section 2487, R. S. 1881, is held in trust, upon her death, for such children, and she can only convey an estate therein for her own life. *Flenner v. Benson*, 108; *Flenner v. Travellers Ins. Co.*, 164
2. *Same*.—*Widow's Interest not Subject to Sale to Pay Husband's Debts*.—The estate in fee which, upon the death of the widow, descends to such children, is not subject to sale to pay the deceased husband's debts. *Ib.*

DESCRIPTION.

See BANK STOCK, 2; CRIMINAL LAW, 16; REAL ESTATE, ACTION TO RECOVER, 2 to 4; VENDOR AND VENDEE, 6.

DILIGENCE.

See BRIDGES, 3; CRIMINAL LAW, 5, 6; INTOXICATING LIQUOR, 4; NEW TRIAL, 5.

DISCRETION.

See DECEDENTS' ESTATES, 7.

DISMISSAL.

See CHANGE OF VENUE; COSTS; CRIMINAL LAW, 14; INSANITY; JUDGMENT, 6; REPLEVIN, 2, 3.

DITCHES AND DRAINS.

See DRAINAGE.

DIVORCE.

See CONTRACT, 1; CRIMINAL CONVERSATION, 2, 4; MARRIAGE, 2.

DONATION.

See RAILROADS, 2, 3.

DRAINAGE.

See CITY.

1. *Assessment*.—*Work and Labor*.—A paragraph of complaint, averring that the plaintiff had instituted proceedings for the establishment and construction of a drain, which was defective, that the defendant and others benefited had executed a written waiver of irregularities, that on the request of the defendant the plaintiff constructed the drain, and the defendant promised to pay his share, which benefited the defendant \$600, and that the defendant stood by and saw the work done, is good on demurrer. *Flora v. Cine*, 208
2. *Commissioner*.—*Suit for Assessment*.—*Lien*.—*Notice*.—*Complaint*.—*Demurrer*.—A complaint by a drainage commissioner, under section 4277, R.

S. 1881, to enforce a lien upon lands for benefits assessed, is insufficient unless it avers that notice of the establishment of the work by the court has been recorded in the recorder's office of the county, as a lien for such assessments does not attach until such notice has been recorded, and this question is presented by a demurrer to the answer.

Scott v. State, etc., 368

3. *Commissioner of.—Petition for Drain.—Notice.—Statute Construed.*—The circuit court has no power, under the provisions of the act of April 8th, 1881, R. S. 1881, sections 4273, 4284, to refer a petition for the location of a ditch to a commissioner of drainage until an affidavit has been filed showing that notice has been given as required by the 3d section of said act, section 4275, R. S. 1881. *Scott v. Brackett, 413*
4. *Same.—Defective Affidavit.*—A defective affidavit will not authorize the reference, nor will a sufficient one subsequently filed cure the defects, as the requirement that notice must be shown by affidavit filed is a condition precedent to the power to make the reference. *Ib.*
5. *Same.—Service of Process.*—Where an insufficient affidavit is filed, the service of process must be deemed defective, and this is good cause for reversal upon appeal. *Ib.*
6. *Same.—Jurisdiction.*—The 8th section of said act, section 4280, R. S. 1881, which provides that the judgment shall be deemed conclusive, that all prior proceedings were regular and according to law, can not apply to such prior proceedings as confer jurisdiction, and, hence, can not cure a defect in the service of process. *Ib.*
7. *Same.—Presumption.*—Where proof of the service of process is in the record, its sufficiency is in no manner aided by any presumption. *Ib.*
8. *Same.—Constitutional Law.*—It does not follow because certain provisions of said act may be invalid, that the entire act is unconstitutional, and as appellant's personal property was not sold, and he was not denied a trial by jury, the constitutionality of these particular provisions does not arise and can not be considered. *Ib.*
9. *Same.*—The act in question is not unconstitutional, for the reason that no provision is made for personal service of notice upon the owner of the land affected by the location of such ditch, nor for the further reason that the commissioners of drainage discharge their duties under the control and subject to the order of the court. *Ib.*

DUPPLICITY.

See CRIMINAL LAW, 15.

EASEMENT.

See CRIMINAL LAW, 19; REAL ESTATE, ACTION TO RECOVER, 1, 2; VENDOR AND VENDEE, 4, 5.

ECCLESIASTICAL LAW.

See CHURCHES.

EJECTMENT.

See REAL ESTATE, ACTION TO RECOVER.

ELECTION.

See CONTRACT, 11.

ELECTIONS.

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ELEEMOSYNARY CORPORATION.

See CHURCHES, 9, 10.

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EMBEZZLEMENT.

See CRIMINAL LAW, 9.

EMINENT DOMAIN.

See RAILROADS, 7.

EMPLOYER AND EMPLOYEE.

See CONVERSION, 3; CRIMINAL LAW, 9; RAILROADS, 4 to 6.

EQUITY.

See CONTRACT, 7; PARTITION, 3; PLEDGE.

ESCROW.

See CONTRACT, 11.

ESTOPPEL.

See CONVEYANCE, 3 to 5; DECEDENTS' ESTATES, 4, 9; DRAINAGE, 1; PROMISSORY NOTE, 1; REAL ESTATE, ACTION TO RECOVER, 1; WILL, 1.

EVICTION.

See VENDOR AND VENDEE, 4, 5, 8.

EVIDENCE.

See BILL OF EXCEPTIONS, 5, 7, 10; COMMON CARRIER, 1; CONTRACT, 3; CONVERSION, 1; CRIMINAL CONVERSATION, 5; CRIMINAL LAW, 1, 2, 3, 4, 17; DECEDENTS' ESTATES, 3; DEMURRER TO EVIDENCE; EXECUTION, 3 to 5; GUARDIAN AND WARD, 2; INSTRUCTIONS TO JURY, 1, 3, 4; INTOXICATING LIQUOR, 1 to 4, 6, 7; JUDGMENT, 7; MARRIAGE; NEGLIGENCE, 3; NEW TRIAL, 5, 7; PAYMENT; PRACTICE, 1, 2, 4, 6, 7, 10; PROMISSORY NOTE, 4, 5; SUPREME COURT, 4, 18; VENDOR AND VENDEE, 3, 6, 8; VERDICT; WILL, 2.

EXCEPTIONS.

See DECEDENTS' ESTATES, 5; PRACTICE, 3, 9, 11, 14; SPECIAL FINDING, 1.

EXCESSIVE DAMAGES.

See CRIMINAL CONVERSATION, 4.

EXECUTION.

See BANK STOCK, 1 to 4; HUSBAND AND WIFE, 1; RECEIVER, 4.

1. *Exemption.—Schedule and Affidavit.*—In the absence of the execution defendant, the affidavit of his wife claiming exemption of property from execution under the act of 1861 (Acts 1861, p. 119), her affidavit for that purpose, verifying the schedule, showing that the schedule contains "a full and true account of all * * * property" of her husband, "and held by him at the date of the issuing of the execution," is sufficient without the words "or in which he then had any interest."

Astley v. Capron, 167

2. *Same.—Statute Construed.*—Statutes exempting property from execution are to be liberally and reasonably construed. *Ib.*
3. *Same.—Replevin.—Evidence.—Instruction.*—Where a schedule and affidavit, made to claim property exempt from execution, showed some chattels sold after the execution issued, but did not account for the proceeds thereof, it is not error to instruct the jury in an action of replevin by the execution defendant against the sheriff, for the goods seized, that if it was shown by the evidence that the goods sold and not sold did not exceed \$300 in value, that would be a sufficient accounting for the proceeds of the goods sold. *Ib.*
4. *Same.—Evidence.*—In replevin against the sheriff for goods levied on by execution, claimed as exempt, the schedule and affidavit made by

- the wife of an absent debtor and presented to the sheriff, with a demand for exemption pursuant to the statute, are admissible in evidence. *Ib.*
- 5. *Same.—Householder.—Housekeeper.*—A householder, in the sense of the statute exempting property from execution, is not necessarily a housekeeper; it is sufficient if he be the head of a family to whose support he contributes. *Ib.*
- 6. *Lien.*—Where judgment liens on land accrue at the same time, the execution first issued and levied gives priority. *Loury v. Reed, 442*
- 7. *Same.—Sheriff's Sale After Return Day.*—If an execution be levied on land before the return day, a sale afterwards will be valid. *Ib.*
- 8. *Exemption.—Judgment.—Tort.*—A widow, by concealing an antenuptial contract, whereby she had relinquished all interest in her husband's estate, obtained from his administrator personal property of the value of \$600 as of right as widow. For this wrong the administrator afterwards sued her and obtained judgment.

Held, that the judgment was for a tort, and not upon contract, and no property was, under section 703, R. S. 1881, exempt from execution issued upon it. *Nowling v. McIntosh, 593*

EXEMPLARY DAMAGES.

See CRIMINAL CONVERSATION, 6.

EXEMPTION.

See EXECUTION, 1 to 5, 8; HUSBAND AND WIFE, 1; RECEIVER, 4.

EXHIBIT.

See MORTGAGE, 5.

FALSE IMPRISONMENT.

See NOTARY PUBLIC.

FENCE.

See RAILROADS, 1, 12.

FINDING.

See JUDGMENT, 5; LANDLORD AND TENANT; PRACTICE, 16; SPECIAL FINDING; SUPREME COURT, 16; VERDICT.

FORECLOSURE.

See FRAUDULENT CONVEYANCE, 3; MORTGAGE; PLEADING, 1.

FORFEITURE.

See CONVEYANCE, 2; CORPORATIONS, 1; INSURANCE, 1; RAILROADS, 2, 3, 8, 9.

FORMER ADJUDICATION.

See CHURCHES, 2, 8; JUDGMENT, 7; RECEIVER, 3, 5.

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See CONTRACT, 2; CRIMINAL LAW, 9, 20; DEMURRER TO EVIDENCE, 2; FRAUDULENT CONVEYANCE; INSURANCE, 1; VENDOR AND VENDEE, 1 to 3, 7, 9, 11.

FRAUDULENT CONVEYANCE.

See DEMURRER TO EVIDENCE, 2; MARRIED WOMAN.

1. *Consideration.*—Where the grantor and grantees of real estate combine in a fraudulent design to defraud creditors, the conveyance will not be protected as against them, though a full consideration was paid by the grantee. *Buck v. Voreis, 116*

2. *Same.—Resulting Trust.*—Property fraudulently conveyed is held by the grantee in trust for the creditors of the grantor. *Ib.*
3. *Same.—Complaint.—Mortgage.*—A complaint averred that C. induced V., the plaintiff, to become surety for her on an appeal bond, representing that she was the owner of unencumbered real estate, and by executing thereon a mortgage, securing him from loss; that he was compelled to pay, as surety, a certain amount; that at the time of the execution of the mortgage the real estate was encumbered by a judgment in favor of B. & T.; that on this judgment the property was sold and bought in by them; that the sale was fraudulently made for the purpose of keeping the property out of the reach of the creditors of C.; that she retained possession of it; that there was an agreement that B. & T. should hold the property for the use of C. until she desired a reconveyance; that V. had no knowledge of the judgment until after the sheriff's sale, and that he had tendered the full amount of the judgment, interest and costs to B. & T.

Held, in an action to foreclose such mortgage and to redeem from the sale under the judgment, that the complaint was sufficient. *Ib.*

4. *Intent.—Notice.*—When a conveyance is assailed as fraudulent as against the creditors of the grantor, the grantee not being a volunteer, both the fraudulent intent of the grantor and notice thereof to the grantee must be shown. *First Nat'l Bank v. Carter*, 317

5. *Same.—Sheriff's Sale.—Agreement.—Consideration.—Husband and Wife.—Notice.—Creditor's Bill.*—One insolvent and largely indebted, in order to defraud his creditors, procured an uncle of his wife to buy at sheriff's sale his lands, worth \$2,000, at that sum, upon an agreement that the uncle should, as he did, actually pay off the execution, \$1,559.92, and give the land to the debtor's wife. The debtor, as agreed, received for the excess of the bid, and the uncle assigned the sheriff's certificate to the wife, who took a sheriff's deed.

Held, that, it not appearing that the uncle or the wife had notice of the fraud, creditors could not subject the land to the payment of their demands. *Ib.*

6. *Subsequent Creditors.—Trusts.—Presumption.*—A conveyance to defraud existing creditors, but without any secret trust or any intent to defraud subsequent ones, taken by the debtor to another, can not be held fraudulent at the suit of the latter, under section 2975, R. S. 1881.

Stumph v. Bruner, 556

GARNISHMENT.

See JUDGMENT, 8.

GIFT.

See INTOXICATING LIQUOR, 1.

GRAND JURY.

See CRIMINAL LAW, 13.

GRAVEL ROAD.

See HIGHWAYS.

GROWING CROPS.

See LANDLORD AND TENANT.

GUARDIAN AND WARD.

See INSANITY.

1. *Settlement.—Appeal to Supreme Court.*—Until a guardian has finally settled and been discharged, so that he has nothing more to do as guardian, an appeal will not lie from an order of the court concerning the settlement of the guardianship. *Pfeiffer v. Crane*, 485

2. *Evidence.—Bond.—Principal and Surety.*—The declarations of a guardian, made to his attorney when preparing his reports, are not proper evidence on behalf of his sureties, in a suit upon his bond.
Williams v. State, ex rel., 570
3. *Same.—Conversion.—Liability of Sureties on Second Bond.*—In a suit against the sureties upon a guardian's second bond, for conversion of the ward's money by the guardian, there can be no recovery unless it be shown that the conversion occurred after the execution of the bond. *Ib.*
4. *Same.—Judgment Without Relief.—Statute Construed.*—The statute, R. S. 1881, sections 577, 578, requires that judgments against sureties on guardians' bonds shall be without relief from appraisement laws. *Ib.*

HARMLESS ERROR.

See DECEDENTS' ESTATES, 3; QUIETING TITLE.

HEIRS.

See DECEDENTS' ESTATES, 4; DESCENTS, 2; WILL.

HIGHWAYS.

See CRIMINAL LAW, 16 to 19; PRACTICE, 12.

1. *Free Turnpike Roads.—Act of March 3d, 1877.—County Board.—Judicial Powers and Duties.—Decisions and Orders.—Collateral Attack.*—Under the act of March 3d, 1877, "authorizing boards of county commissioners to construct gravel, macadamized, or paved roads, upon petition," etc., which should be "free of toll" (sections 5091 to 5103, R. S. 1881), such county boards are clothed with original jurisdiction, and are required to exercise judicial powers and duties in relation to the location, establishment and construction of such free roads ; and the decisions and orders of such county boards, in proceedings instituted under such act, are not the subjects of collateral attack, but are conclusive and final except upon an appeal therefrom to the circuit court of the county.
Million v. Board, etc., 5
2. *Same.—Omitted Lots or Lands.—Addition and Re-apportionment.—Change in Improvement.—Power of County Board.*—Under section 5095, R. S. 1881, the county board is authorized, after the final order for the improvement has been made, where there has been an omission of benefited lots or lands from the assessment, to make such addition and re-apportionment as it may deem just and proper, and such change in the improvement as will conform the same to public requirement. *Ib.*
3. *Same.—Informality, Error or Defect.—Complaining Party.—Complaint.*—Under section 5102, R. S. 1881, the party complaining of any informality, error or defect appearing in the record of the county board, in any such proceeding, must show in his complaint that he is injuriously affected thereby, and in what respect, and that the same can not be corrected by the county board, before he can be permitted to take advantage of such informality, error or defect, by an action in the circuit court. *Ib.*
4. *Gravel Roads.—Use of Highway.—County Commissioners.*—A grant by the county commissioners, to a gravel road company, to occupy and use a public highway for its gravel road, confers the right to make such excavations thereon as may be necessary in the grading of its road.
Carter v. Clark, 238
5. *Gravel Roads.—Competing Lines.—Injunction.*—A gravel road company, organized under the general laws of this State, can not prevent by injunction the construction of another competing line of turnpike, which is to be free from tolls. *Crawfordsville, etc., T. P. Co. v. Smith, 290*
6. *Gravel Roads.—Tolls.*—There is nothing in the statute concerning the organization of gravel road companies which prohibits them from in-

serting in their articles of association a clause that their roads shall be free. R. S. 1881, section 3624. *State, ex rel., v. Jones, 349*

HOSPITAL FOR THE INSANE.

See AUDITOR OF STATE, 3.

HOUSEHOLDER.

See EXECUTION, 5.

HUSBAND AND WIFE.

See CONTRACT, 1; CRIMINAL CONVERSATION; DEMURRER TO EVIDENCE, 2; DESCENTS; EXECUTION, 1 to 8; FRAUDULENT CONVEYANCE, 5; MARRIAGE; MARRIED WOMAN; MORTGAGE, 1, 8.

1. *Tort of Wife.—Judgment.—Execution.—Exemption.*—At common law, the husband is liable for the tort of his wife, not on account of any breach of the marriage contract, but as an incident of the marriage relation or status. Therefore, where judgment was rendered against a husband for the tort of his wife, and an execution was issued thereon, he could not claim any part of his property as exempt from sale on such execution upon the ground that his liability for his wife's tort resulted from his marriage contract with her. *McCabe v. Berge, 225*
2. *Same.—Wife's Tort.—Statutory Rule.*—Under section 5120, R. S. 1881, in force since September 19th, 1881, husbands are not liable for the torts of their wives. *Ib.*
3. *Earnings of Wife.—Sole Property of Wife.*—Under section 5130, R. S. 1881, the earnings and profits of a wife, accruing from her trade, business, services or labor, other than labor for her husband and family, are her sole and separate property, and the common law rule to the contrary is superseded and abrogated. *Boots v. Griffith, 246*
4. *Contract.—Parties.*—Where a husband contracted in his own name for the benefit of his wife, both might join as plaintiffs under the code of 1852, sections 4 and 8, to enforce it. *Scotton v. Mann, 404*
5. *Same.—Verdict.—Damages.*—In a joint suit by husband and wife on a contract made by the husband, containing covenants, some of which are for the separate benefit of each, the jury may find separate damages in favor of each. *Ib.*
6. *Husband's Liability for Necessaries for Wife and Children.—Implied Promise.*—When a husband by cruelty drives his wife and infant children from his house, without means of support, and the wife's father furnishes them necessaries, the latter may recover on an implied promise of the husband to pay, though the husband has given notice that he would not be responsible. *Watkins v. De Armond, 553*

INDICTMENT.

See CRIMINAL LAW, 11, 15; INTOXICATING LIQUOR, 2.

INFORMATION.

See CRIMINAL LAW, 15, 16; INTOXICATING LIQUOR, 2, 7.

INJUNCTION.

See COSTS; HIGHWAYS, 5; RAILROADS, 3; VENDOR AND VENDEE, 5, 8.

INSANITY.

1. *Guardianship of Insane Person.—Dismissal of Proceeding.—Duty of Court.*—A proceeding, under section 2545, R. S. 1881, to have an inhabitant of the county declared to be a person of unsound mind and incapable of managing his own estate, with a view to his guardianship, is not a civil action, and, therefore, the person instituting such proceeding

has no right to dismiss the same without the consent of the court; and, as a rule, the court ought not to consent to the dismissal of such proceeding over the objections of the person alleged to be of unsound mind. *Galbreath v. Black*, 300

2. *Same*.—*Judgment for Costs*.—Under section 2548, R. S. 1881, where, in such a proceeding, the jury find that the person, against whom the complaint is filed, is not of unsound mind, the court must render judgment for costs against the person making such complaint. *Ib.*

INSANE HOSPITAL.

See AUDITOR OF STATE, 3.

INSOLVENCY.

See CONSTABLE, 2.

INSTRUCTIONS TO JURY.

See CITY, 2; CONTRACT, 3; CRIMINAL CONVERSATION, 6; CRIMINAL LAW, 10; DECEDENTS' ESTATES, 5; EXECUTION, 3; PRACTICE, 7; SUPREME COURT, 3 to 5, 12, 14.

1. *Evidence*.—An instruction which assumes a fact which is conclusively shown by the evidence is not objectionable therefor. *Astley v. Capron*, 167
2. Instructions to the jury must be considered as a whole, and will not be deemed erroneous because, if viewed in separate parts, such parts may be incorrect. For examples, see opinion. *McDermott v. State*, 187
3. *Same*.—*Witness*.—*Impeachment*.—*Jury*.—*Credibility*.—An instruction, which tells the jury how witnesses may be impeached, and that it does not follow that an impeached witness is to be wholly disbelieved, that the jury are to judge of the weight due to such witnesses after considering how far they have been corroborated, does not assume that any witness has been impeached, nor is it otherwise erroneous. *Ib.*
4. *Practice*.—*Trial by Jury*.—On the trial of a cause by a jury, it is error for the court, in its instructions, to assume the truth of any fact in controversy, or to invade the peculiar province of the jury to determine, for themselves, the credibility of the different witnesses and the weight of their evidence. *Finch v. Bergins*, 360

INSURANCE.

1. *Life Insurance*.—*Forfeiture*.—*Fraud*.—*Contract*.—*Performance*.—*Complaint*.—*Premiums*.—A complaint, in an action to recover premiums paid on a forfeited life insurance policy, alleged that a life policy had been assigned to the plaintiff with the approval of the insurance company. The premiums were to be \$155 per annum, payable quarterly, and were so paid for six years, when the plaintiff, being ready to pay, could find no agent of the defendant, at the usual place, to receive the money, and the defendant then declared the policy forfeited for non-payment of that premium. It was offered the next day to an agent elsewhere. There was no averment that the plaintiff had performed the conditions of the contract, nor what such conditions were.

Held, on demurrer, that the complaint was insufficient.

Held, also, that, if fraud in declaring the policy forfeited was relied on, the facts constituting it should have been alleged.

Held, also, that where a risk attaches premiums paid during its continuance can not be recovered back. *Continental Life Ins. Co. v. Houser*, 258

2. *Mere Relation of Parent and Child does not give Child an Insurable Interest in Parent's Life*.—A daughter has not necessarily an insurable interest

in her mother's life, and in a suit by her on such a policy, taken by her, she must allege and prove a pecuniary interest in the life of the mother.

Continental L. Ins. Co. v. Volger, 572

INTENTION.

See CRIMINAL LAW, 7, 8, 18; FRAUDULENT CONVEYANCE, 4, 6.

INTEREST.

Usury.—Recoupment.—Statute Construed.—Usury paid while the act of 1861 (1 R. S. 1876, p. 600) was in force, can not be recouped in a suit brought for the debt after the act of 1879 (Acts 1879, p. 43) took effect.

Kepler v. Conkling, 392

INTERROGATORIES TO JURY.

See DECEDENTS' ESTATES, 5; NEW TRIAL, 2; PRACTICE, 5; SUPREME COURT, 2.

When the court sends to the jury interrogatories fully covering all material questions of fact, all others asked may be refused. *Scheible v. Slagle*, 323

INTOXICATING LIQUOR.

1. *Gift on Sunday.—Evidence.—Witness.—Cross-Examination.*—Prosecution against a bartender at a drinking shop, for giving away liquors on Sunday in violation of section 2098, R. S. 1881. As a witness for himself the accused testified that he had orders from his employers, which he obeyed, not to do the thing charged.

Held, that he might be asked on cross-examination whether he had not done the same thing on other Sundays. *Fassinow v. State*, 235

2. *Sale on Sunday.—Drunk as a Beverage.—Indictment or Information.—Evidence and Defence.*—In a prosecution for the unlawful sale of intoxicating liquor, under section 2098, R. S. 1881, upon Sunday or upon either of the other days named in such section, the indictment or information must charge, to be sufficient, that the sale of the intoxicating liquor was made "to be drunk as a beverage;" but where the evidence shows the sale, on either of the days named, of an intoxicating liquor which is ordinarily drunk as a beverage, and the defendant claims that it was not sold to be drunk as a beverage, this is matter of defence to be shown by him, and, in the absence of such showing, the court or jury will be justified in finding him guilty of the offence charged. *Morel v. State*, 275

3. *Same.—Cause for New Trial.—Newly-Discovered Evidence.—Contradiction or Impeachment of Witness.*—Where newly-discovered evidence is assigned as cause for a new trial, and it is apparent from the affidavits filed in support of such cause, that the only purpose of such evidence is to contradict and impeach the testimony of a witness on the previous trial, there is no error in the refusal of the court to grant a new trial for the introduction of such evidence. *Ib.*

4. *Same.—Accident or Surprise.—Diligence.—New Trial.*—In a prosecution for the unlawful sale of intoxicating liquor to a certain person, on a certain Sunday, the defendant has no right to be surprised at the evidence of such person, tending to prove such sale; and such surprise, where no diligence whatever is shown, is not sufficient cause for a new trial. *Ib.*

5. *Sale as Medicine.—Statute Construed.*—Section 5320, R. S. 1881, is not violated by selling less than a quart of intoxicating liquor without license, in good faith, for medicinal purposes, but prudence and caution are required of the seller. *Hottendorf v. State*, 282

6. *Same.—Evidence.*—As to the evidence sufficient to sustain a finding that intoxicating liquor was sold unlawfully and not for medicinal purposes, see opinion. *Ib.*

7. *Keeping Place where Sold, in Disorderly Manner.—Nuisance.—Proof of.—License to Sell.*—In a prosecution under section 17, act of 1875, 1 R. S. 1876, p. 869, for keeping a liquor shop in a disorderly manner, where the information alleges that the defendant was licensed, proof of the license is necessary to conviction. *Brubaker v. State*, 577

JUDGE.

See BILL OF EXCEPTIONS, 4.

1. *Appointment Pro Tem.*—On the first day of the term a judge *pro tem.*, duly appointed, held the court. On the second day another judge *pro tem.*, appointed on that day, appeared and held the court, and did so for several days, the record during those days being silent as to the one first appointed. *Semble*, the second appointee had due authority. *Fussinow v. State*, 235
2. *Judge Pro Tem.—Appointment.—Collateral Attack.*—The appointment by a regular judge of a judge *pro tem.* in a pending cause can not be collaterally questioned by the judgment defendant, who made no objection to the manner of the appointment of the judge *pro tempore* until the filing of his motion for a new trial. *Adams v. Gourdin*, 358

JUDGMENT.

See CONTRACT, 1; DECEDENTS' ESTATES, 9; DEFAULT, 2; EXECUTION, 6, 8; FRAUDULENT CONVEYANCE, 3; GUARDIAN AND WARD, 4; HUSBAND AND WIFE, 1; INSANITY, 2; PRACTICE, 16; RECEIVER, 3, 5; REVIEW OF JUDGMENT; SUPREME COURT, 8, 9, 11; SURVEY, 2; VENDOR AND VENDEE, 5, 8.

1. *Principal and Surety.—Pleading.*—Error in presenting an issue by answer, as to the question of suretyship in an action upon a note, instead of by cross complaint, does not make the judgment establishing the suretyship void; nor does the fact that such pleading was not properly signed affect the validity of the judgment. *McCormick v. Webster*, 105
2. *Same.—Jurisdiction.—Presumption.*—Where the record of a court of general jurisdiction is silent upon the subject, jurisdiction will be presumed. *Ib.*
3. *Same.*—Where a plaintiff takes judgment, in an action upon a promissory note, on the same day that one of the defendants files an answer of suretyship, and a judgment is entered accordingly, such plaintiff can not afterwards question the jurisdiction of the court on account of want of legal service of process. *Ib.*
4. *Same.—Notice.—Collateral Attack.*—The judgment of a court of general jurisdiction can not be collaterally attacked where there has been some service of notice, although such notice and service may be materially defective. *Ib.*
5. *Finding.*—A finding of matters not in issue is not proper, and a judgment thereon adjudicating matters not in question is erroneous. *Koonts v. First Nat'l Bank*, 178
6. *Appeal.—New Trial.—Statutes Construed.*—An order granting a new trial on complaint for causes after the term, as provided by section 563, R. S. 1881, is a final judgment within the meaning of section 632, and an appeal therefrom lies to the Supreme Court. *Hines v. Driver*, 339
7. *Evidence.—Jurisdiction.—Former Recovery.—Record of Justice.*—The record of a judgment of a justice of the peace, or other court of inferior and limited jurisdiction, in order to be valid evidence of a former recovery, must show affirmatively that jurisdiction was acquired. *Newman v. Manning*, 422
8. *Same.—Attachment.—Garnishment.—Notice.—Publication.*—In an attachment case before a justice of the peace, wherein the summons against

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the principal defendant has been returned unserved, and no property has been attached, there can not be entered a valid judgment against a garnishee until after due notice by publication to the principal defendant has been had; and that it has been had must be shown by the record. *Ib.*

9. *Same.*—In such case, the record being silent, it is not competent to supplement it by proof that the proper notice was published, and that the principal defendant had knowledge of the action before judgment was taken against the garnishee. *Ib.*
10. *Service of Process.—Presumption.—Jurisdiction.*—The presumption that there was service of process, which attaches to the silent record of a judgment of a court of general superior jurisdiction, is rebuttable, and when rebutted by evidence the judgment is avoided.

Warring v. Hill, 497

JUDICIAL KNOWLEDGE.

See DEPOSITIONS, 1.

JUDICIAL SALE.

See MARRIED WOMAN; MORTGAGE, 8.

JURISDICTION.

See CHANGE OF VENUE; CHURCHES; CONVERSION, 2; DRAINAGE, 6; JUDGMENT, 2 to 4, 7 to 10; REPLEVIN.

JURY.

See CRIMINAL LAW, 1, 2, 10, 13; DECEDENTS' ESTATES, 1; INSTRUCTIONS TO JURY.

JUSTICE OF THE PEACE.

See JUDGMENT, 7; REPLEVIN..

LANDLORD AND TENANT.

Contract.—Growing Crops.—Ownership.—Possession.—Special Finding.—Verdict.—Conclusions of Law.—It was found that A. planted a field of wheat under a written contract, which was set out. This contract gave A. possession of the crop, required him to harvest and thresh it, and deliver one-half of it to the landlord, and in express terms provided that each should own one-half.

Held, that these facts compelled the conclusion, as one of law, that A. was owner of half the wheat, and, therefore, the verdict, which did not find such ownership in terms, was not defective. *Gordon v. Stockdale, 240*

LARCENY.

See CRIMINAL LAW, 9, 20.

LAW OF CASE.

See SUPREME COURT, 1.

LEGISLATIVE APPROPRIATION.

See AUDITOR OF STATE.

LIEN.

See CONTRACT, 1; DRAINAGE, 2; EXECUTION, 6; MORTGAGE, 6; VENDOR'S LIEN.

LIFE-ESTATE.

See DESCENTS.

LIFE INSURANCE.

See INSURANCE.

LIQUOR LAW.

See INTOXICATING LIQUOR.

LOTTERY.

1. *Contract.—Vested Right.*—*Constitutional Law.*—A State may, in the exercise of its police power and in the interest of good morals, take away and abrogate a lottery privilege previously granted, without impairing the obligation of a contract within the meaning of the Constitution of the United States. *State v. Woodward, 110 Ib.*
2. *Same.—Sale of Lottery Tickets.*—*Vincennes University.—Criminal Law.*—The lottery privilege conferred on the Vincennes University by the Territorial Legislature in 1807 was taken away by section 8, art. 15, of the State Constitution, and the statute (R. S. 1881, section 2077,) makes the sale of lottery tickets a crime. *Ib.*

MANDAMUS.

See AUDITOR OF STATE, 2; BANK STOCK, 1 to 4; TOWN, 1.

MARRIAGE.

See HUSBAND AND WIFE, 1.

1. *Presumption.—Evidence.*—A marriage will, in the absence of countervailing evidence, be presumed to exist so long as both parties live; and evidence that the husband afterwards, in a remote place, for a long period, cohabited with another woman, and had children by her, and that during all that time she was recognized as his wife, has no tendency to prove a dissolution of the original marriage, and is not admissible for that purpose. *Wiseman v. Wiseman, 479 Ib.*
2. *Same.—Divorce.*—The oral statement of a husband or wife that they have been divorced is not sufficient evidence thereof; nor will a separation, however protracted, be sufficient to create the presumption of a divorce. *Ib.*

MARRIED WOMAN.

See CONTRACT, 1; CRIMINAL CONVERSATION, 1; DEMURRER TO EVIDENCE, 2; DESCENTS; EXECUTION, 1 to 5; FRAUDULENT CONVEYANCE, 5; HUSBAND AND WIFE; MORTGAGE, 1, 8.

Fraudulent Conveyance.—Judicial Sale of Husband's Lands.—Bankruptcy.—A wife joined her husband in a conveyance to S. of his lands to defraud his creditors, and the husband was afterwards adjudged a bankrupt. The assignee brought a suit against S. to set aside the fraudulent conveyance, which was compromised by S. conveying the lands by quit-claim to the assignee, who afterwards sold and conveyed the same as part of the bankrupt's estate.

Held, that the wife, by virtue of section 2508, R. S. 1881, was entitled to one-third of the lands in fee simple. *Mattill v. Baas, 220*

MASTER AND SERVANT.

See CONVERSION, 3; CRIMINAL LAW, 9; RAILROADS, 4 to 6.

MASTER COMMISSIONER.

See DECEDENTS' ESTATES, 6.

MEASURE OF DAMAGES.

See CONSTABLE, 2; VENDOR AND VENDEE, 4, 8.

MILL DAM.

See VENDOR AND VENDEE, 8, 9.

MISTAKE.

See BILL OF EXCEPTIONS, 1.

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MOB.

See COMMON CARRIER.

MORTGAGE.

See CORPORATIONS, 3 to 5; COUNTY TREASURER; FRAUDULENT CONVEYANCE, 3; PLEADING, 1; RECEIVER, 2 to 5; VENDOR AND VENDEE, 8, 11.

1. *Married Woman.—Husband and Wife.*—Suit against husband and wife to foreclose a mortgage made by them while the act of 1879 (Acts 1879, p. 160) was in force. Answer by the wife, that she owned the land by gift, and that the mortgage was made to secure a debt of the husband. Reply that the mortgage was made in consideration of the release of the land from a former mortgage, and the extension of the time of payment.

Held, that the reply was good.

Fitzpatrick v. Papa, 17

2. *Trust and Trustee.—Innocent Purchaser.—Parol Trust.*—As against a mortgagee in good faith a trust in favor of another than the mortgagor can not be established by parol. *Ib.*
3. *Same.—Cross Complaint to Quiet Title.—Practice.*—In a suit to foreclose a mortgage, if a defendant file a cross complaint to quiet title, the general denial will, under the statute, admit proof of any defence to the cross complaint. *Ib.*
4. *Foreclosure by Assignee.—Complaint.—Parties.*—A complaint by an assignee to foreclose a mortgage, which merely avers that the mortgage was endorsed to him, without stating by whom, is not good as against a demurrer for defect of parties, because the mortgagee is not made a defendant. *Nichol v. Henry*, 54
5. *Same.—Endorsements.—Exhibit.*—Where several endorsements appear upon the mortgage, but the complaint makes no reference to them, its averments can not be aided by them. *Ib.*
6. *Same.—Allegations of Complaint Against One Claiming Title.*—The mere averment in a complaint to foreclose a mortgage against a person other than the mortgagor, that "he is now the owner of the land," is not sufficient to show that the mortgage constitutes a lien upon the land as against him, as he may have acquired the land before the mortgage was executed. *Ib.*
7. *Same.—Record.—Index.—Constructive Notice.*—A mortgage which is spread upon the mortgage record, and duly indexed in such book, is constructive notice to a subsequent purchaser for value, though it is not entered in the entry-book or indexed in the general index. *Ib.*
8. *Husband and Wife.—Wife's Inchoate Interest in Real Estate.—Appearance.—Waiver.*—A wife whose inchoate interest in real estate has become absolute by a judicial sale, under sec. 2508, R. S. 1881, is entitled, in a suit to foreclose a mortgage which she joined her husband in executing, if she appears and demands it, to an order in the decree directing that the husband's interest be first offered for sale, and that, if it brings a sufficient sum to pay the debt, her interest be not sold.

Quære, whether she waives such right by failing to appear and assert it.

Hardy v. Miller, 440

MUNICIPAL CORPORATIONS.

See BRIDGES; CITY; NEGLIGENCE, 3; TOWN.

MURDER.

See CRIMINAL LAW, 7, 8.

NAME.

See ASSIGNMENT OF ERROR; CORPORATION, 2; DEFAULT, 2; PLEADING, 3.

NATIONAL BANK.

See BANK STOCK; PLEADING, 3; PLEDGE.

NECESSARIES.

See HUSBAND AND WIFE, 6.

NEGLIGENCE.

See BRIDGES, 4; CITY; COMMON CARRIER, 2; CONSTABLE; RAILROADS, 4 to 6.

1. *Street.*—Reckless and careless riding or driving upon a public street, whereby another, without fault, is injured, is actionable. *Simons v. Gaynor*, 165
2. *Same.—Street Crossing.—Contributory Negligence.*—The fact that a footman crosses a street elsewhere than at the usual crossings is not *per se* contributory negligence which will defeat an action against another who injures him by recklessly riding or driving against him. *Ib.*
3. *Same.—Evidence.*—Municipal ordinances regulating the speed of driving may be considered in determining whether the defendant was guilty of recklessness in driving against the plaintiff. *Ib.*

NEW TRIAL.

See APPEAL; BILL OF EXCEPTIONS, 3; CRIMINAL LAW, 1, 2, 13; DEFAULT, 1; INTOXICATING LIQUOR, 3, 4; JUDGMENT, 6; PARTITION, 1; PRACTICE, 5, 10, 13, 16; SPECIAL FINDING, 1, 4; WILL, 2.

1. *Error.*—The granting of a new trial is available error only when it is plain that flagrant injustice has been done thereby. *Fitzpatrick v. Papa*, 17
2. *Same.—Effect of.*—A new trial sets aside not only a general verdict, but also answers of the jury to interrogatories. *Ib.*
3. *Application for as of Right.—Action to Quiet Title.—What is.*—The nature of a suit depends on the complaint and judgment, and not on the judgment alone. A complaint by heirs at law to set aside a deed of their ancestor, and praying to quiet their title to the lands is a complaint to quiet title, in which a new trial as of right may be granted, under section 1064, R. S. 1881. *Physio-Medical College v. Wilkinson*, 23
4. *Same.—Practice.*—A new trial as of right, under the statute, may be applied for either orally or in writing. *Ib.*
5. *Newly-Discovered Evidence.—Diligence.—Counter Affidavits.*—Counter affidavits are admissible, in an application for a new trial on account of newly-discovered evidence, upon the question of diligence. *Zeller v. Griffith*, 80
6. *Surprise.*—It is seldom that the plaintiff should be granted a new trial on account of surprise. *Scheible v. Slagle*, 323
7. *Cause for New Trial.—Newly-Discovered Evidence.—Contradiction or Impeachment of Witness.*—Where newly-discovered evidence is assigned as cause for a new trial, and it is apparent from the affidavits filed in support of such cause, that the only purpose of such evidence is to contradict and impeach the testimony of a witness on the previous trial, there is no error in the refusal of the court to grant a new trial for the introduction of such evidence. *Morel v. State*, 275
8. *Partition.—Quieting Title.—New Trial as of Right.*—Complaint for partition, averring that C. was in possession without title, and as to him praying that title be quieted against a cloud which, by his possession and otherwise, it was alleged he created. Finding and decree of partition and against C.

Held, that C. was entitled to a new trial as of right, under the statute, section 1064, R. S. 1881. *Cooter v. Baston*, 185

9. *Practice.—Causes for New Trial.—Verdict or Finding.—Judgment.*—Under the sixth clause of section 559, R. S. 1881, the causes for a new trial therein mentioned are predicated upon the verdict of the jury, or the decision in the sense of finding of the court, and not upon the judgment. *Rodefer v. Fletcher, 563*

NEWLY-DISCOVERED EVIDENCE.

See INTOXICATING LIQUOR, 3; NEW TRIAL, 5, 7.

NOTARY PUBLIC.

Witness.—Contempt.—Depositions.—False Imprisonment.—A notary public has no power, either at common law or by statute, when taking a deposition, to punish the witness as for contempt for contumacious refusal to answer proper questions; and where the witness was committed to jail for such refusal, an action for false imprisonment will lie against the notary. *Burti v. Pyle, 398*

NOTICE.

See BRIDGES, 3; CONTRACT, 11; DEPOSITIONS, 1; DRAINAGE, 2 to 9; FRAUDULENT CONVEYANCE, 4, 5; HUSBAND AND WIFE, 6; JUDGMENT, 3, 4, 8 to 10; MORTGAGE, 7; VENDOR'S LIEN.

NUISANCE.

See INTOXICATING LIQUOR, 7.

OFFICE AND OFFICER.

See AUDITOR OF STATE; BANK STOCK, 1 to 4; BRIDGES; CONSTABLE; COUNTY TREASURER; CRIMINAL LAW, 17; HIGHWAY, 1 to 4; RAILROADS, 9; SHERIFF; SURVEY; TOWN, 1.

Officers.—To Whom Liable.—An officer is liable for breach of official duty only to the person to whom the duty is owing.

State, ex rel., v. Harris, 363; State, ex rel., v. Parkinson, 602

OFFICIAL BOND.

See CONSTABLE; COUNTY TREASURER.

OPEN AND CLOSE.

See PRACTICE, 12, 15.

OWNERSHIP.

See CONVERSION, 1, 3, 4; LANDLORD AND TENANT; PLEDGE.

PARENT AND CHILD.

See HUSBAND AND WIFE, 6; INSURANCE, 2.

PARTIES.

See ASSIGNMENT OF ERRORS; CONVERSION, 2; HUSBAND AND WIFE, 4, 5; MORTGAGE, 4, 6; RAILROADS, 3; TOWN, 1; WILL, 6; WITNESS.

PARTITION.

See WILL, 1.

1. *Quieting Title.—New Trial as of Right.*—Complaint for partition, averring that C. was in possession without title, and as to him praying that title be quieted against a cloud which, by his possession and otherwise, it was alleged he creates. Finding and decree of partition and against C. Held, that C. was entitled to a new trial as of right, under the statute, sec. 1064, R. S. 1881. *Cooter v. Baston, 185*
2. *Tenants in Common.—Improvements.—Payment for.*—Where one tenant makes valuable and lasting improvements upon the common property without the knowledge or consent of his co-tenant, he can not compel

such co-tenant to contribute anything toward the payment of such improvements. *Elrod v. Keller*, 382

3. *Same.*—*Allowance for Improvements.*—When a tenant has made improvements without the consent of his co-tenant upon a portion of the common property, a court of equity, in making partition of such property, will set apart to such tenant the portion so improved by him, if it can be equitably done. *Ib.*
4. *Same.*—Where improvements thus made affect the entire property, compensation will not be made upon partition unless the improvements were necessary or useful to the enjoyment of the estate. *Ib.*
5. *Same.*—Where improvements are thus made upon property not susceptible of division, no allowance will be made for such improvements from the proceeds of such property, unless such improvements were made with knowledge and without objection from the co-tenants, or were necessary to the enjoyment of the estate, or were made under such circumstances as create an equitable claim for them. *Ib.*

PARTNERSHIP.

1. *Individual Liability.*—*Creditors.*—A partnership creditor is not entitled to pro-rate with individual creditors in individual property. *New Market Nat. Bank v. Locke*, 428
2. *Same.*—*Decedents' Estates.*—*Administrator de son Tort.*—Suit to recover the amount of a bill of exchange drawn by partners, upon the ground that the defendants were liable as administrators *de son tort* of one of the partners who was dead. Answer, that the surviving partner had assets as such sufficient to pay all partnership liabilities, and that the defendants had applied all the property of the deceased to the discharge of his individual liabilities. *Held*, that the answer was good on demurrer. *Ib.*
3. *Dissolution.*—*Contract.*—Where, on dissolution of a partnership, all matters between the partners are settled, one of them agreeing to pay an outstanding note of the firm, which he fails to do, and the other is compelled by suit to pay it, the latter may recover the amount from the former. *Warring v. Hill*, 497
4. *Same.*—*Agreement.*—Partners may sue each other for breach of an express agreement made between them, e. g., as where, upon a consideration, one fails to pay a partnership debt which he had agreed to pay, and the other is compelled to pay it. *Ib.*

PAYMENT.

See PROMISSORY NOTE, 7.

1. *Evidence.*—The defence of payment is not made out by evidence which shows that less than the whole debt was paid. *Longworth v. Higham*, 352
2. *Promissory Note.*—A promissory note given and received as payment discharges a debt. *Warring v. Hill*, 497

PERFORMANCE.

See CONTRACT, 1, 6 to 8; INSURANCE, 1.

PERSONAL PROPERTY.

See BANK STOCK; CONVERSION; EXECUTION, 3; LANDLORD AND TENANT; PLEDGE; TAXES.

PLEADING.

See BANK STOCK, 3, 4; CITY, 1; COMMON CARRIER, 1; CONSTABLE, 3; CONTRACT, 1, 2; CONVEYANCE, 5; COUNTER-CLAIM; CRIMINAL CONVERSATION, 1; CRIMINAL LAW, 11, 12, 15, 16; DECEDENTS' ESTATES, 2, 8; DRAINAGE, 1, 2; FRAUDULENT CONVEYANCE, 3; HIGHWAYS, 3; INSURANCE, 1; INTOXICATING LIQUOR, 2, 7; MORTGAGE, 1, 3 to 6;

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PRACTICE, 8 ; QUIETING TITLE; RECEIVER, 5 ; REAL ESTATE, ACTION TO RECOVER, 2, 5 ; REVIEW OF JUDGMENT; SET-OFF; SUPREME COURT, 7, 10 ; SURVEY, 1 ; VENDOR AND VENDEE, 3 ; WILL, 6.

1. *Complaint.—Amendment.*—A complaint on a note, and to foreclose a mortgage securing it, may be amended, without leave, at any time before trial, by the withdrawal of so much as relates to the mortgage.
Sayers v. First Nat'l Bank, 230
2. *Same.—Answer After Issue.*—The refusal to permit the defendant, after the issues are closed, to plead an additional defence, which, if true, must have been known before, is not error.
Ib.
3. *Same.—Variance.—Name of Bank.*—The variance between "1st Nat. Bank of Crawfordsville, Ind.," and "First National Bank of Crawfordsville," is amendable on the trial, and will not be regarded in the Supreme Court.
Ib.
4. *Uncertainty.—Demurrer.*—Mere uncertainty in a pleading can not be reached by demurrer.
Continental Life Ins. Co. v. Houser, 258
5. *Practice.—Demurrer.—Form.*—A demurrer assigning as cause "that said paragraphs, nor either one of them, contain facts sufficient to constitute a cause of action," is sufficient under the code.
State, ex rel., v. Younts, 313
6. *Same.—Statute of Limitations.*—The statute of limitations is not available on demurrer to a complaint, unless the complaint affirmatively shows that the case is not within any of the exceptions to the statute.
Ib.
7. *Demurrer to Reply, When not Carried back to Answer.*—Where a demurrer to a reply has been overruled, the plaintiff can not on appeal raise the question whether the demurrer should have been carried back and sustained to the answer.
Scheible v. Slagle, 323
8. *Answer.*—An answer filed to the entire complaint, but only answering a part thereof, is bad on demurrer.
Franklin Life Ins. Co. v. Dehority, 347
9. *Demurrer.—Answer.—Complaint.*—A demurrer to an answer reaches the complaint, and, if the complaint is insufficient, it is error to sustain the demurrer, whether the answer is good or bad.
Scott v. State, etc., 368
10. *Implied Promise.*—A complaint, alleging facts from which the law will imply a promise, though it fail to aver the promise, will resist a demurrer.
Watkins v. De Armond, 553

PLEDGE.

See BANK STOCK, 4, 5.

National Bank Stock.—Certificate of.—Possession.—The title to and ownership of stock in a national bank can only pass by a transfer of the stock on the books of the bank; hence the mere possession of a certificate of stock in a national bank is not such a possession as to constitute the holder a pledgee, but is at most a mere equity.

Koonts v. First Nat'l Bank, 178

POSSESSION.

See LANDLORD AND TENANT; WILL, 1.

PRACTICE.

See ASSIGNMENT OF ERROR; BILL OF EXCEPTIONS; CHANGE OF VENUE; COSTS; COUNTER-CLAIM; CRIMINAL LAW, 5, 6, 11 to 15, 21; DECEASED'S ESTATES, 5, 7, 10; DEFAULT; DEPOSITIONS; INSANITY; INSTRUCTIONS TO JURY; INTERROGATORIES TO JURY; INTOXICATING LIQUOR, 3, 4; JUDGE; JUDGMENT, 1; MORTGAGE, 3; NEW TRIAL; RAILROAD, 11; RECEIVER, 4; REPLEVIN, 3; SHERIFF; SPECIAL FINDING; STARE DECISIS; SUPREME COURT; SURVEY.

1. *Evidence.—Objection.*—*Supreme Court.*—Only such objections to evidence admitted as have been stated below can be made in the Supreme Court,

and the objection must be specific and not vague or too general, as that a deposition "was not properly and legally certified."

Fitzpatrick v. Papa, 17

2. *Same.*—*Evidence.*—A party can not divide his evidence in proof of a fact, and give part of it in chief and the other part in rebuttal. *Ib.*
3. *Exceptions.*—*Supreme Court.*—Where no exception has been taken to the overruling of a demurrer to a reply, no question as to the sufficiency of the reply can be made in the Supreme Court. *Wales v. Miner*, 118
4. *Same.*—*Evidence.*—Error in excluding evidence is cured by the subsequent introduction of the same evidence. *Ib.*
5. *Interrogatories.*—*New Trial.*—Error of the court in refusing to require specific answers to interrogatories sent to the jury is only available as a cause for a new trial. *Astley v. Capron*, 167
6. *Evidence.*—If the plaintiff fail to prove some essential fact, and the defendant supplies the omission, it is sufficient. *Ib.*
7. *Same.*—*Instruction.*—An instruction which assumes a fact which is conclusively shown by the evidence is not objectionable therefor. *Ib.*
8. *Pleading.*—*General Denial.*—Where the general denial is pleaded, a special paragraph, averring facts which merely controvert the complaint, is needless, and it is not available error to sustain a demurrer to it. *Flora v. Cline*, 208
9. *Same.*—*Record.*—*Supreme Court.*—A motion to strike out a pleading, and the pleading struck out, unless made part of the record by bills of exceptions or other proper proceedings, can not be noticed by the Supreme Court. *Ib.*
10. *Admission of Evidence.*—*Cause for New Trial.*—*Supreme Court.*—The admission of improper evidence is an error of law occurring at the trial, and must be assigned as such in the motion for a new trial, to present any question for the decision of the Supreme Court. *Boots v. Griffith*, 246
11. *Error.*—The sufficiency of a reply can not be questioned for the first time in the Supreme Court, but objections thereto must be properly presented to the trial court. *Hon v. State, ex rel.*, 249
12. *Open and Close.*—*Burden of Issue.*—On appeal from proceedings before a board of commissioners in reference to the location of a highway, where the remonstrance, having been amended in the circuit court, is for damages only, the remonstrant is entitled to open and close, because he has the burden of the issue. *Peed v. Brenneman*, 252
13. *New Trial.*—A motion by a defendant for a new trial, upon "his paragraphs of counter-claim and set-off," though they were the only pleadings upon which issues were made, raises no question. The motion should be for a new trial generally. *Johnson v. McCulloch*, 270
14. *Same.*—*Exceptions.*—An exception to two or more rulings in gross reserves no question. *Ib.*
15. *Open and Close.*—The mere fact that the counsel in opening the argument to the jury fails to read or comment on some instructions which the court has decided to give, and then does so in his closing argument, will not enable the Supreme Court to say that it was error to refuse a further speech to opposing counsel. *Wiseman v. Wiseman*, 479
16. *Causes for New Trial.*—*Verdict or Finding.*—*Judgment.*—Under the sixth clause of section 559, R. S. 1881, the causes for a new trial therein mentioned are predicated upon the verdict of the jury, or the decision in the sense of finding of the court, and not upon the judgment. *Rodefer v. Fletcher*, 563

PRESCRIPTION.

See CRIMINAL LAW, 19.

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PRESUMPTION.

See COSTS, 3; CRIMINAL LAW, 7; DRAINAGE, 7; FRAUDULENT CONVEYANCE, 6; JUDGMENT, 2, 10; MARRIAGE; PROMISSORY NOTE, 7; RESIDENCE.

PRINCIPAL AND AGENT.

See CONTRACT, 11; CONVERSION, 2 to 5.

PRINCIPAL AND SURETY.

See BANK STOCK, 4; CONSTABLE; COUNTY TREASURER; DECEDENTS' ESTATES, 6; FRAUDULENT CONVEYANCE, 3; GUARDIAN AND WARD, 2 to 4; JUDGMENT, 1, 3; PROMISSORY NOTE, 1 to 3; SET-OFF, 3.

PROCESS.

See COUNTER-CLAIM; DRAINAGE, 3 to 9; JUDGMENT, 3, 4, 8 to 10.

PROMISE.

See CONTRACT, 5; DRAINAGE, 1; HUSBAND AND WIFE, 6; PLEADING, 10.

PROMISSORY NOTE.

See CONTRACT, 9, 10; JUDGMENT, 1, 3; PLEADING, 1.

1. *Principal and Surety.—Estoppel.*—Where one signs a note containing a stipulation that all whose names are signed thereto agree to be held as principal debtors, he is estopped from asserting as against the obligee that he is a surety. *Menaugh v. Chandler, 94 Ib.*

2. *Same.—Set-Off.*—A claim in favor of one only of several defendants can not be set off against a note executed by them, in a suit by the payee thereon. *Ib.*

3. *Same.—Statute Construed.*—Where one executes a note, agreeing therein that he is a principal, he can not claim a right to a set-off under the statute, R. S. 1881, section 349. *Ib.*

4. *Evidence.—Declarations.—Decedents' Estates.*—In an action upon a promissory note executed by a decedent, payable out of his estate after his death, it is error to admit evidence of declarations of the decedent in reference to the note made after its execution, and in the absence of the payee. *Harcourt v. Harcourt, 104*

5. *Same.—Consideration.*—In such case evidence of a valuable consideration is necessary to support the note. *Ib.*

6. *Same.—Endorsement.*—The endorsement of a note to "The trustees of the Indiana Asbury University" does not vest title in the persons who are trustees, and where there is a further endorsement, "Trustees of Indiana Asbury University, by John W. Ray, treas.," it will not be assumed, contrary to averment, that Ray had no authority to make such endorsement. *Sayers v. First Nat'l Bank, 230*

7. *Payable in Bank.—Payment.—Presumption.*—A promissory note given and received as payment discharges a debt; nor is there any legal presumption that a note so given was not payable in bank. *Waring v. Hill, 497*

PUBLIC AID.

See RAILROADS, 2, 3, 8 to 11.

PUBLICATION.

See JUDGMENT, 8, 9.

QUIETING TITLE.

See MORTGAGE, 3; NEW TRIAL, 3, 8; PARTITION, 1.

Pleading.—Harmless Error.—Where the general denial is pleaded to a complaint to quiet title, special paragraphs are useless under the statute, R. S. 1881, section 1055, and there can be no harm in sustaining demurrers to them. *West v. West, 529*

RAILROADS.

See COMMON CARRIER; CONVEYANCE, 2; DEFAULT, 2; REAL ESTATE, ACTION TO RECOVER, 1, 2.

1. *Killing Animals.—Fence.—Burden of Proof.*—In an action against a railroad company for killing stock at a place on its track where the fence enclosing it was not securely maintained, the burden is upon it of showing reasons for its failure to properly maintain a secure fence at that place. *Cincinnati, etc., R. R. Co. v. Ford*, 92
2. *Tax.—Donation.—Public Aid.—Forfeiture.—Statutes Construed.*—Section 18, 1 R. S. 1876, p. 740, and section 3, Acts 1872, p. 56, concerning the forfeiture of aid to the construction of railroads, apply only in cases of donation, and not where stock has been subscribed. Nor do they apply where a portion of the tax levied has been collected and paid to the railroad company. *Board, etc., v. Indianapolis, etc., R. W. Co.*, 101
3. *Same.—Parties.—Injunction.*—Suit by taxpayers to restrain the collection of taxes voted in September, 1878, by a township in aid of a railroad, and levied by the county board in 1881. All the proceedings prior to the levy of the taxes were regular. In 1879 one-half the sum voted was levied and placed on the duplicate, and the other half in 1881, the road being then permanently located, constructed and in operation through the township and a sum expended therein greater than the aid voted.

Held, that by virtue of section 4094, R. S. 1881, the railroad company was entitled to the money, and the injunction would not lie.

Held, also, that a taxpayer of the township, upon his application, showing that the treasurer and other defendants had refused to permit defence save in the circuit court, was properly admitted by the court to defend. *Norton v. Milner*, 197

4. *Liability for Negligence of Fellow Servants.*—A railroad company which carelessly employs incompetent servants is liable to another servant injured by such incompetency, unless it is shown that he had notice of such incompetency. *Pennsylvania Co. v. Roney*, 453

5. *Same.—Contributory Negligence.*—An engineer of a passenger train might have jumped from his engine when he saw the danger and thus probably have avoided much danger, but to save his passengers he remained at his post and lost his life.

Held, that he was guilty of no contributory negligence which would release or lessen the employer's liability. *Ib.*

6. *Same.*—The orders of a proper superior, and customary obedience thereto, inconsistent with general printed rules for his government, which have been furnished to a locomotive engineer, may be obeyed without constituting contributory negligence. *Ib.*

7. *Railroad Company.—Special Charter.—Width of Right of Way.—Estate Appropriated.—Construction of Railroad.—Telegraph Poles.*—The Jeffersonville Railroad Company was originally incorporated, under the name of "The Ohio and Indianapolis Railroad Company," by an act approved January 20th, 1846 (Local Laws 1846, p. 153). In section 14 of this act the company was "invested with all the rights and powers necessary for the construction and repair of a railroad from the town of Jeffersonville, near the falls of the Ohio, to the town of Columbus, in the county of Bartholomew, *not exceeding sixty feet wide*, with as many set of tracks as the president and directors may deem necessary." By an act approved January 15th, 1849, the corporate name of the company was changed to "The Jeffersonville Railroad Company," and for the purpose of constructing its road, with all desirable appendages, the company was "authorized to enter upon, take, and hold *in fee simple* all real estate and materials necessary for that purpose." Under its charter and the amendments thereof, the railroad company entered

upon and took the plaintiffs' real estate and thereon constructed its line of railroad, in and before June, 1851, without any conveyance or gift thereof to the company, and without any claim or proceeding instituted by the owner of the land for the assessment of his damages. It does not appear that, at the time of its appropriation of the plaintiffs' land, the company limited the width of such appropriation to a less width than sixty feet as allowed by its charter. Upon the foregoing facts—

Held, that by its entry upon, and the construction of its road over and across, the lands of the plaintiffs' ancestor, the railroad company appropriated, took and held such lands, in fee simple, to the full width allowed, namely, "sixty feet wide."

Held, also, that it is competent for the railroad company, within the limits of such appropriation, to erect itself, or by contract with another company, such telegraph poles as are or may be necessary to the proper maintenance of a line of telegraph along the line of its railroad.

Prather v. Western, etc., Co., 501

8. *Aid.—Election and Returns.—Informality.*—Mere informalities in the returns of an election concerning aid to a railroad, which can not possibly prejudice any substantial right, or a failure to conform to any requirement of the statute which is directory only, or an error which is clearly clerical, are not sufficient to defeat the appropriation voted.

Irwin v. Lowe, 540

9. *Same.—Forfeiture.—Conditions.—County Commissioners.*—When a petition for aid is upon conditions, expressed in the petition, that the road shall be completed through the township, and a depot erected thereon, by a day named, a failure to perform the conditions forfeits the aid voted, under the provisions of the statute, R. S. 1881, sections 4045 and 4062; and, after such forfeiture, the aid so voted will be no obstacle to voting aid to another railroad upon proper petition under section 4045.

Ib.

10. *Same.—Cities.—Constitutional Law.*—It is no impediment to granting aid by a township that it includes a city which is in debt to the extent permitted by the constitution.

Ib.

11. *Same.—Appeal.—Practice.*—On appeal from an order of the county commissioners, levying a tax to meet an appropriation in aid of a railroad, the questions to be tried are those only which have been put in issue before the board.

Ib.

12. *Action Against for Stock Killed.—Fencing.*—Where an animal is killed by cars, having entered upon the railroad at a place not fenced on either side, but where it is practicable to fence only on one side, the railroad company is not liable under the statute. R. S. 1881, sections 4025—4032.

Indiana, etc., R. W. Co. v. Leak, 596

RATIFICATION.

See DEMAND.

REAL ESTATE.

See CONTRACT, 6 to 11; CONVEYANCE; DECEDENTS' ESTATES, 4, 6; DEMURRER TO EVIDENCE, 2; DESCENTS; DRAINAGE; FRAUDULENT CONVEYANCE; MARRIED WOMAN; MORTGAGE; PARTITION; RAILROADS, 7; REAL ESTATE, ACTION TO RECOVER; RECEIVER; VENDOR AND VENDEE; WILL, 1, 4, 5.

REAL ESTATE, ACTION TO RECOVER.

See CONVEYANCE, 5.

1. *Ejectment.—Streets.—Rights of Abutting Lot Owner.—Easement.—Location of Railroad on Street.—Damages.—Estoppel.*—The owner of a lot abutting on a street is seized in fee to the center of the street subject to

the easement of the public, and may maintain ejectment against a railroad company which has placed its track thereon without payment or tender of damages, and such owner is not estopped from maintaining his action by not forbidding the occupancy of the street by the railroad company. *Terre Haute, etc., R. R. Co. v. Rodel*, 128

2. *Same.*—*Complaint.*—A complaint in ejectment, which avers that the plaintiff is seized in fee of a certain lot (giving description), which “abuts on First street, in the city of T. H., and the defendant unlawfully and without right has taken possession of said First street,” is good after verdict. *Ib.*
3. *Description.*—A description of real estate which furnishes a starting point and gives the boundary line by admeasurement is not void for uncertainty, though the monuments given are not fixed, and the distance between certain points is given as so many feet, more or less, as in such case the monuments may be disregarded and the phrase “more or less” treated as surplusage. *Dale v. Travellers Ins. Co.*, 473
4. *Same.*—A statement, following such description, that the land described is the same acquired from “S., excepting a tract 25 feet wide by 65½ feet long, conveyed to I.,” does not show that any portion was excepted from the description given, but shows that all the land described, except the lot named, was acquired from S., and does not render the description given indefinite. *Ib.*
5. *Cross Complaint.*—A cross complaint, filed by a defendant in an action for the recovery of real estate, averring his ownership of the property, that the plaintiff asserts title thereto, but has none, is sufficient on demurrer. *Collins v. McDuffie*, 562

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RECEIVER.

1. *Appointment of.*—*Collateral Attack.*—An order of court appointing a receiver can not be collaterally attacked. *Storm v. Ermantrout*, 214
2. *Same.*—*Mortgage.*—*Renta.*—Where mortgaged property is insufficient to pay the debt, and the debtor is insolvent, the creditor may have a receiver appointed to collect and apply the rents to the payment of the mortgage debt. *Ib.*
3. *Same.*—*Res Adjudicata.*—Where a decree has been rendered adjudging that the mortgagee is entitled to the rents accruing from the mortgaged property, and a receiver is appointed and directed to collect and apply the rents to the mortgage debt, the mortgagor can not afterwards claim that he is entitled to such rent. *Ib.*
4. *Same.*—*Execution.*—*Exemption.*—*Practice.*—Where the mortgagee, in a suit to foreclose, asks for the appointment of a receiver, claiming the application of rents to the payment of his debt, the proper time for the mortgagor to claim such rent as exempt from execution is upon the hearing of the motion for the appointment of a receiver. *Ib.*
5. *Same.*—*Answer.*—*Judgment.*—Suit by a mortgagor against a mortgagee to recover rents collected by a receiver appointed in a suit to foreclose the mortgage. Answer, that the money belonged to W., who had been appointed receiver to collect the rents, and was directed by decree of the court to pay the same to the defendant upon his demand, for the reason that the mortgaged premises were not sufficient to pay the debt, and that the plaintiff was insolvent; that the sum realized on sale of the mortgaged property, with the rents collected as decreed, is not enough to satisfy the mortgage debt.

Held, that the answer was good on demurrer, and that the decree directing the receiver to pay the rents to the mortgagee was an adjudication which could not be attacked collaterally. *Ib.*

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1. *Justice of the Peace.—Jurisdiction.—Statute Construed.*—The jurisdiction of a justice of the peace, in an action of replevin, is governed by the provisions of section 1433, R. S. 1881, and not by the provisions of section 1547, R. S. 1881. *Fawknor v. Baden*, 587

2. *Same.—Bond or Undertaking.—Dismissal of Action.—Error.*—Where the plaintiff in replevin, before a justice of the peace, files with the justice an undertaking, as provided in section 1270, R. S. 1881, instead of the penal bond required in section 1547, *supra*, such undertaking is in substantial compliance with the requirements of the latter section, and is a valid, legal and binding obligation; and in such case it is error to sustain a motion for the dismissal of the action for the want of a penal bond. *Ib.*

3. *Same.—Affidavit.—Writ of Replevin.—Motion to Quash.—Practice.*—In such a case, where the justice has issued a writ of replevin, the proper remedy of the defendant, if he claims either that the affidavit is defective or that the bond is insufficient, is a motion to quash the writ for either or both of such causes. *Ib.*

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Presumption.—Where residence is shown in this State for a number of years, it will be presumed to continue unless the opposite party show that it has been lost; and it is not lost by going to another State and engaging in business there with the intention *ultimately* of residing there.

Astley v. Capron, 167

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Warranty.—*Breach of.*—A reaper was sold with a warranty that it would work well, the purchaser upon a day's trial to give the seller notice and allow time to put it in order, and if it could not be made to work return it. It failed to operate well; the notice was given, and, no one appearing to put it in order, the purchaser, after the lapse of a week, returned it, meantime continuing to use it until he had cut his grain.

Held, that there was a breach of the warranty, and that the seller could not recover for the machine. *McCormick, etc., Co. v. Hays*, 582

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See CONTRACT, 2; PROMISSORY NOTE, 2, 3; STATUTE OF LIMITATIONS, 2.

1. *Demurrer.*—Where a demurrer is filed to two or more paragraphs of answer, by way of set-off, jointly, and not to each separately, the demurrer must be overruled if either paragraph state facts sufficient to constitute a good set-off. *Gregory v. Gregory*, 345

2. *Same.*—An answer by way of set off, which does not show that the defendant held the claim which he offers to set off, at the time the suit was commenced, is bad on demurrer for the want of sufficient facts. *Ib.*

3. *Same.*—*Principal and Surety.*—An answer by way of set-off, by one of two or more defendants, is bad on demurrer for the want of facts, if it fail to show by proper averments, that the defendant pleading the set-off is principal, and his co-defendants are sureties, in the plaintiff's cause of action. *Ib.*

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1. *Sheriff's Return.*—*Amendment.*—*Record.*—*Practice.*—A motion by a sheriff for leave to amend his return to a writ, so that the return may speak the whole truth, is not a civil action; pleadings, issues, a jury trial and change of venue are improper, but the court should grant the leave, on a showing by affidavit or otherwise, whenever the truth and justice require it, and may direct the clerk so to amend the record of the return that it will be as the amended return. *Wilcox v. Moudy*, 232

2. *Same.*—A sheriff's return to a writ is made on his official responsibility, and he only can afterwards amend it, but it must be on leave. The court can not compel him to correct it. *Ib.*

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2. *Same.—Facts Not Found.*—Where a special finding leaves an issue undetermined, that issue is regarded as not proved by the party having the burden of proof. *Ib.*
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1. *Mutual Accounts.*—Where the items of an account on the credit side are wholly for payments, the account is not mutual in the sense of section 295, R. S. 1881, so that the statute of limitations will not begin to run until the date of the last item on either side; but in such case the statute will be a bar, except as to items of indebtedness within six years.

Perrill v. Nichols, 444

2. *Set-Off.*—A set-off is not barred by the statute of limitations, though the full time had elapsed when the plaintiff's cause of action accrued. R. S. 1881, section 367.

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2. Where the record does not show that interrogatories have been sent to the jury in the manner contemplated by the statute, R. S. 1881, section 546, no question upon a refusal to require more specific answers thereto will be considered by the Supreme Court. *Astley v. Capron, 167*
3. *Same.—Instructions.*—An instruction to the jury which is correct as far as it goes, but not full enough, can not be questioned in the Supreme Court, unless the lower court has refused, on request, to give a fuller one on the subject. *Ib.*
4. *Instructions.—Evidence.*—Where the evidence is not in the record, instructions, which might be correct under evidence which could have been properly admitted, will be upheld in the Supreme Court.
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State, ex rel., v. Harris, 363;
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8. *Reversal of Judgment.—Error.*—Affirmance on appeal, notwithstanding hurtful error, pursuant to sections 398 and 658, R. S. 1881, is justified only when it affirmatively appears by the record that the merits of the cause have been fairly tried and determined; but if this be uncertain there will be a reversal. *Kepler v. Conkling, 392*
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Scotton v. Mann, 404

10. *Complaint*.—Unless a complaint has been attacked by a proper proceeding below or by error assigned, the Supreme Court will not consider as to its sufficiency. *Pennsylvania Co. v. Roney*, 453

11. *Same*.—*Judgment non Obstante Veredicto*.—When there has been no motion below for judgment, notwithstanding the general verdict, no question as to the right thereto can arise in the Supreme Court. *Ib.*

12. *Same*.—*Instructions*.—Instructions given at the request of a party can not be questioned by him in the Supreme Court. *Ib.*

13. *Briefs*.—A brief which merely states questions, without discussing them, does not bring any question before the Supreme Court.

Nowlin v. Whipple, 490

14. *Same*.—*Instructions*.—Written instructions given do not become part of the record without a bill of exceptions, where the only signature thereto is that of counsel to exceptions on the margin. R. S. 1881, sections 533-535. *Ib.*

15. *Brief*.—Merely calling the attention of the Supreme Court to a question, and asking its judgment upon it is no such argument of the question as under the rules of the court, will secure its decision thereon.

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16. *Brief*.—*Special Finding*.—The Supreme Court will not, upon a mere general statement in the brief of counsel that a special finding does not support the conclusions of law, consider whether or not the conclusions of law are erroneous. *Collins v. McDuffie*, 562

17. *Superior Court*.—*Assignment of Error*.—Where, on an appeal to the Supreme Court from a superior court, the only errors assigned are those assigned on appeal from special to general term no question is thereby presented to the Supreme Court. Error must be assigned on the decision of the court at general term. *Deitch v. Demoll*, 601

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2. *Same*.—*Judgment on Appeal*.—If in such case the survey be found incorrect, the court may order a re-survey and appoint a competent person to make it (R. S. 1881, section 5955), but it is error to direct him how to make it. *Ib.*

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Failure to Transmit Message.—Penal Statutes.—Conflict of Laws.—The statute (R. S. 1881, section 4176), giving a right to recover a penalty for failure of a telegraph company to transmit a message as required, has no extra-territorial force, and, therefore, is not applicable where the contract was made at an office in another State to send the message to this State. *Carnahan v. Western, etc., Co.*, 526

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1. *School Trustees.—Township Trustee.—School Fund.—Mandate.—Relator.—Parties.*—Where money has been apportioned to a school township and received by the trustee thereof, some of which belongs to a school town afterwards organized, and he refuses to pay it over, he may be compelled by mandate to do so, and the school trustees of the town are the proper relators in such a suit. *Hon v. State, ex rel.*, 249
2. *Same.—Organization of Corporation.*—The regularity of the organization of the town as a corporation can not be questioned in such a proceeding, nor is it necessary to prove more (if anything on that subject) than the exercise of corporate functions. *Ib.*

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1. *Fraud.*—*Contract.*—*Rescission.*—An offer to rescind a purchase of land for fraud, made five months after the conveyance, without any reason for the delay, comes too late. *Hunt v. Blanton, 38*

2. *Same.*—*Fraudulent Representations.*—*Damages.*—One who is induced by fraudulent representations as to its character to purchase lands at a price above its value may recover damages without rescinding the contract. *Ib.*

3. *Same.*—*Complaint.*—*Evidence.*—*Variance.*—A complaint by a purchaser of lands against the vendor alleged fraud, in that the defendant, for the purpose of deceiving, procured a guide to exhibit to the plaintiffs other lands, of greater value, as the lands sought to be inspected. The court found, and the evidence proved, that the plaintiffs and defendant were equally misled by the guide, without the knowledge or wish of the defendant, who merely paid the guide for his services.

Held, that this did not sustain the complaint. *Ib.*

4. *Recoupment.*—*Eviction.*—*Easement.*—*Measure of Damages.*—A grantee of property, of which an incorporeal hereditament forms a material part, is entitled, as against the grantor who conveys and warrants the property to him, to recoup against the purchase-money the value of such incorporeal hereditament from which he is evicted, the measure of damages being the value of the right from which the grantee is evicted; and such value is ascertained by finding what proportion the value of the part from which the grantee is evicted bears to the entire purchase-price. *Scheible v. Slagle, 323*

5. *Same.*—*Judgment.*—*Injunction.*—A judgment, perpetually enjoining a grantee from using an easement which his grantor assumed to convey to him, may be treated as an eviction. *Ib.*

6. *Same.*—*Deed.*—*Description.*—*Evidence.*—The office of a description in a deed is not to identify the land conveyed, but to furnish the means of identification; and, when there is a general designation of the property intended to be conveyed, parol evidence is competent to show what property the description covers. *Ib.*

7. *Same.*—*Fraudulent Representations.*—Fraudulent representations as to the character of the property, relied upon by the purchaser and resulting in damages to him, is a good defence to an action for purchase-money. *Ib.*

8. *Same.*—*Evidence.*—*Judgment.*—*Appeal.*—*Recoupment.*—*Measure of Damages.*—*Deed.*—*Covenants, Breach of.*—*Eviction.*—Suit to foreclose a mortgage for purchase-money of a mill. The defence was that the plaintiff covenanted that he had a right to maintain the dam at a height of $7\frac{1}{2}$ feet, whereas the right was to a dam only $4\frac{1}{2}$ feet high, claiming damages. When the conveyance was made, a suit was pending against the plaintiff, wherein it was afterwards adjudged that the dam must be reduced to a height of $4\frac{1}{2}$ feet, but the cause was in the Supreme Court, pending on appeal.

Held, that the record of this judgment was proper evidence for the defendant, and not affected by the appeal.

Held, also, that the judgment, being in the form of an injunction, bound the defendant, though not a party to it, and operated *per se* as an eviction from part of the property, which enabled the defendant to recoup for breach of covenant, his damages to be the value of the right from

which he was evicted, measured by ascertaining the proportion it bears to the whole purchase-price.

Held, also, that, inasmuch as the deed did not specify the height of the dam, but granted all privileges to the real estate belonging, parol evidence was admissible to show its height at that time, and that the right to so maintain it was what was warranted by the deed. *Ib.*

9. *Same.*—*Contract.*—*Fraudulent Representations.*—Where, in the sale of a mill the vendor, by falsehood, fraudulently induces the vendee to believe that he has a right to a greater height of dam than he really has, to the injury of the latter, he may recoup when sued for the purchase-money. *Ib.*
10. *Contract.*—*Title.*—When a vendor actually secures to his vendee the title contracted for orally, the purchase becomes valid, and the purchaser is bound for the purchase-money, according to the terms of his promise. *Stephenson v. Arnold*, 426

11. *Fraud.*—*Contract.*—*Sheriff's Sale.*—*Redemption.*—*Deed.*—*Consideration.*—*Agreement.*—O., a weak-minded, confiding old man, owned 300 acres of land, worth \$18,000, which had been sold on execution for \$2,138.92, subject to a mortgage of \$5,000, and the sheriff's certificate was held by L., who, with S. and F., confederated for the purpose of swindling O. out of the land and dividing its proceeds amongst themselves. The plan was to prevent O. from redeeming from the sheriff's sale. S., who was wealthy and had the unbounded confidence of O., became his adviser, and professing much friendship and sympathy for O., who was embarrassed financially and also in domestic trouble, and by orally agreeing to purchase 180 acres of the land at a price and terms, for cash, which would afford money in time to redeem, and more than enough also to discharge the mortgage, he prevented O. from making another arrangement to redeem, and then by divers falsehoods and tricks avoided the performance of his agreement until the year for redemption had expired and L. had obtained a sheriff's deed. Then, by like fraudulent devices, he obtained from O. a quitclaim of all his land, upon the agreement that if he succeeded in getting in the title conveyed by the sheriff he would still comply with his parol contract to purchase. Upon learning how he had been cheated, O. brought suit to vacate his deed to S., but was defeated because he had not tendered the money paid to the sheriff.

Held, that upon these facts O. would recover from S., as in *indebitatus assumpsit*, the price of the 180 acres as agreed by the oral contract, and the value of the residue of the land less the encumbrances.

Ayers v. Slifer, 433

VENDOR'S LIEN.

Notice.—Proof of notice of a vendor's lien, acquired by a purchaser in another transaction two years before his purchase, is not sufficient to charge the lands with the lien, as against him. *Foulks v. Reed*, 370

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Special Verdict.—*Finding.*—*Evidence.*—A special verdict should find facts and not merely evidence of them, so that the law will irresistibly infer

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WILL.

See **CHURCHES**.

1. *Devise.—Widow.—Tenants in Common.—Parol Partition.—Agreement.—Consideration.—Estoppel.—Statute of Frauds.—Adverse Possession.—Deed.*—A testator had devised four tracts of land, one each to A., B. and C., who were required to pay \$500 to the testator for the use of the estate, and the fourth to his widow for life, with remainder to the plaintiffs; the widow renounced the will, and claimed under the law, but agreed with A., B. and C. that if they would pay the sum required she would claim no interest in the lands devised to them, but would hold the tract devised to her in fee, and at her death invest the plaintiffs with the title thereto, the plaintiffs assenting to this agreement; A., B. and C. accordingly paid the \$500, and each took and held, fenced, and made other lasting improvements on, the land devised to him, and while they were so holding the widow conveyed the undivided one-third of all of the lands to the plaintiffs, who brought suit for partition.

Held, that, while there may be a parol partition of lands between tenants in common, the facts stated do not show a partition between the widow and A., B. and C.

Held, also, that the widow was not bound by her agreement not to assert an interest, because the agreement was not in writing and was without consideration.

Held, also, that the facts do not constitute an estoppel against the widow or the plaintiffs to assert title.

Held, also, that there was no such adverse possession by A., B. and C. as to invalidate the deed of the widow to the plaintiffs. *Switzer v. Hauk*, 73

2. *Construction.—Supreme Court.—Evidence.—Bill of Exceptions.—New Trial.*—Complaint by an administrator with the will annexed, to have the will construed. There was a trial by the court and a finding. The terms of the will were such that parol evidence might have been admitted to aid in its construction, and it appeared by the record that evidence was heard, but there was no bill of exceptions containing it.

Held, that the Supreme Court could not review the action of the court be-

low in refusing a new trial, nor could it consider whether or not the court had erred in construing the will. *Price v. Price*, 90

3. *Descendant.—Heir.—Statute Construed.*—The word "descendant," as used in section 2571, R. S. 1881, means an heir in the descending line, and can not include collateral kindred, such as a brother. *West v. West*, 529

4. *Same.—Lapse.—Devise.—Descent.*—A will disposed of the residue of the estate, real and personal, to the testator's brothers, J., T., F. and A. J. died before the testator, leaving a widow and child, and the testator died seized of lands, and with no wife, child or parent surviving him. *Held*, that the devise to J. lapsed, and the lands went to the three surviving brothers, by virtue of the residuary clause of the will. *Ib.*

5. *Same.*—The former distinction between lapsed bequests and lapsed devises, as to their disposition, is destroyed by sections 2567 and 2571, R. S. 1881. *Ib.*

6. *Parties.—Complaint.—Supreme Court.*—Where, in an action to set aside a will, the complaint shows no joint cause of action in the plaintiffs, it is insufficient and may be questioned by assignment of error in the Supreme Court on appeal. *Scott v. Farman*, 580

WITNESS.

See CRIMINAL LAW, 5, 6; DECEDENTS' ESTATES, 7; INSTRUCTIONS TO JURY, 3, 4; INTOXICATING LIQUOR, 1, 3, 4; NEW TRIAL, 7; NOTARY PUBLIC.

1. *Competency.—Parties.—Decedents' Estates.*—Under the act of March 15th, 1879 (Acts 1879, p. 245; R. S. 1881, sec. 499), a plaintiff, being incompetent as a witness, could not call as a witness a defendant who had a common interest with the plaintiff, adverse to the other defendants. *Cupp v. Ayers*, 60

2. *Same.—Requirement of Court to Testify.*—The action of the court in overruling an objection to the competency of a witness is not equivalent to a requirement by the court that the witness shall testify. *Ib.*

END OF VOL. 89.

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